BUY WAR BONDS TO SPEED OUR VICTORY

"–by the dawn's early light–" Francis Scott Key, Fort McHenry, Baltimore, Md.

JUSTICE

# AMERICAN BAR ASSOCIATION JOVRNAL

JULY ☆ 1943

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# *There is . . . "a time to laugh" . . .*

*Ecclesiastes 3:4*

### A Witness Silences the Judge

A certain judge in Madera, California, was trying a case wherein a woman sought to recover a diamond ring she had in a fond moment given to a gentleman friend.

"When you gave this man this ring, didn't you think him the best ever?" asked the judge.

The woman blushed, hesitated, and finally admitted that she did.

"Now be honest," continued the judge, "didn't you think him the handsomest man you had ever known?"

The woman blushed again and leaned over and whispered something to the judge. Presently he instructed the jury to find for her.

Everybody wondered what it was that the plaintiff had whispered to the judge, but His Honor would not tell. Finally the court stenographer revealed the secret. What the woman had whispered was: "Not half so handsome as you are, judge."

### Ne Sutor Ultra Crepidam

Judge (to the Italian, Ricardo, who was applying for naturalization papers): "Ricardo, how many states are there in the United States?"

Ricardo: "Judge, you know your business, I know my business. How many banans to de bunch?"

### Preliminary Courtesies

First lawyer: "You are a cheat."

Second lawyer: "You are a liar."

Judge: "Now you have identified each other, we will proceed with the case."

### "Great Memory, Little Common Sense"

The young attorney was sent out of town to interview an important client in regard to a case.

Later, the head of his firm received the following telegram: "Have forgotten name of client. Please wire at once."

This was the reply: "Client's name Whitehead. Your name Burkey."

### A Justifiable Deduction

A man in Connecticut has broken with his wife because she kept putting nasty notes in his lunch box. The man works in a war plant where many females are employed. The man would be eating a nice liverwurst sandwich when he would bite into a piece of paper. When he extracted the piece of paper from his teeth and read it, it would have something like this on it:

"If you're eating lunch with that blonde riveter again, I hope you choke."

Wife's terribly jealous it seems.

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**Our Cover**—This is the month in which we are invited to join in a demonstration of our devotion to the flag of our country by displaying that flag on our cover. The foreground of the picture is Fort McHenry, where an event took place which inspired Francis Scott Key's patriotic hymn. Our historian, George R. Farnum, writes of the flag and that incident.

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**Judicial Councils of the States**—President Morris, going about the country during the year to which he has devoted himself in the service of the Association, has had opportunity to observe the judicial councils of many of the states and he writes interestingly and informally on that subject.

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**Lawyers and the Renegotiation of Contracts**—Lt. Col. J. Harry LaBrum discusses renegotiation law and policy—which sooner or later may be a matter of interest in any law office, large or small.

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**New Rules of Federal Criminal Procedure**—Arthur T. Vanderbilt summarizes some of the more important questions presented by the draft which his committee has recently submitted to the Supreme Court of the United States and announces the decision of the Court to permit the tentative draft of the new criminal rules to be submitted to the bench and bar of the United States.

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**Post-War Planning**—While the achievement of victory over the marauding forces which plunged the world into war still remains the first objective of the United States, the plain course of the war toward the victory of the allied nations is turning the thoughts of all toward planning for the peace. This subject was discussed at the last meeting of the House of Delegates and is to be discussed again at the next annual meeting in Chicago on August 23-26. Charles M. Lyman, State Delegate from Connecticut, writes on that subject. The presentation of his views is timely and will be followed in the next succeeding number by a symposium, which will present the views of a number of our members who have given thoughtful consideration to this vital question.

## ANNUAL TOPICAL INDEX

In Volume 62 of the American Bar Association Reports there was printed a complete index of subjects dealt with in the first 23 volumes of the JOURNAL. In Volume 65 of the Reports and subsequent volumes, topical indexes of Volume XXIV of the JOURNAL and of each succeeding volume, have been printed. Reprints are available at $1 each of the topical index of the first 23 volumes.

**Legal Assistance to Military Personnel**—Colonel Edmund Ruffin Beckwith, of New York, has written an impressive account of what the bar has done for those in military service.

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**Realtors and the Unlawful Practice of Law**—One of the questions to be discussed at the next meeting of the House of Delegates involves the objection of the Chicago Bar Association to the so-called "Memphis Resolution." Chairman Edwin M. Otterbourg, of the Committee on Unauthorized Practice of the Law, outlined the history of this resolution in the June issue. In this issue is printed the Chicago Bar's criticism of the resolution.

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**Review of Supreme Court Opinions**—Among the most important of the cases reviewed in this issue are the following:

In *U. S. v. Powelson*, involving condemnation of land by the government for Tennessee Valley Authority, it is held error to include as an element of value, the possibility of the use of that land, for power plant purposes combined with other land which could only be obtained by condemnation under a state statute, it being held that such an element is too speculative for consideration.

In *Federal Communications Commission v. NBC*, the Court holds that NBC was a necessary party to administrative proceedings which involved a request by one station for permission to broadcast on a frequency band in which another station had been given prior and exclusive rights, and that the mere right to file a brief and be heard in argument was not a full equivalent of the right to be made a party to the proceeding.

In *Burford v. Sun Oil Co.*, the Court holds that even where diversity of citizenship jurisdiction exists, and a constitutional question is presented, the federal courts of equity should exercise their discretionary power with proper regard to the rightful independence of state governments in carrying out their domestic policy.

Other important cases deal with federal taxation, bankruptcy, and federal procedure.

# CURRENT EVENTS

## Association Award to West Point Cadet

EARL OREN OLMSTEAD, Jr., of Muskogee, Oklahoma, is the 1943 winner of the American Bar Association award to the cadet having the highest standing in law studies of each year's graduating class at the United States Military Academy, West Point. This award was presented for the first time in 1941.

Lieutenant Olmstead is the son of Mr. and Mrs. E. O. Olmstead. He received an honor school appointment to West Point from the Oklahoma Military Academy. He has achieved a high scholastic standing, in addition to participating in many Academy activities. He has been commissioned in the Air Force.

## Eldon R. James Appointed Law Librarian of Congress

THE Library of Congress announces that Eldon R. James, former librarian of the Harvard Law School, has accepted an appointment as Law Librarian, to succeed the late Dr. John T. Vance, who died in Lexington, Kentucky, April 11, 1943. Dr. James received the LL. B. degree from the University of Cincinnati Law School in 1899. For the following twelve years he was engaged in the practice of law. Dr. James was a professor of law at the University of Cincinnati, 1900-12; at the University of Wisconsin, 1912-13; at the University of Minnesota, 1913-14; and dean and professor of law at the University of Missouri, 1914-18.

## Wigmore Memorial Service

INSPIRING tribute was paid to the life and achievements of the late John H. Wigmore, dean emeritus of Northwestern University School of Law, by members of the Bench and Bar at a memorial service held in Chicago, June 11. Kenneth F. Burgess, president of the board of trustees of the university, presided.

Judge Evan A. Evans, of the United States Circuit Court of Appeals, voiced the homage of the judiciary. "There is no appellate court of standing in the land which has not turned for guidance to this scholar and his monumental work on the *Law of Evidence*," said Judge Evans.

Franklyn B. Snyder, president of the university, lauded Dean Wigmore's remarkable ability to continue his productive legal scholarship to the end. "On his eightieth birthday," President Snyder said, "he presented to the University his just-published *Guide to International Law and Practice*, and characterized it with an almost boyish pride as 'My last—no, I mean my latest—work.'"

Charles P. Megan, of Chicago, representing the Bar, pointed out that the difficult field of international law was for Dean Wigmore an absorbing, lifelong interest. "It would seem," said Mr. Megan, "as if everything else that he wrote was a side issue. He was foremost in the establishment of an Inter-American Bar Association. He organized, promoted, publicized, and attended conferences for the exchange of ideas and the working out of plans for cooperation in public and private law among the nations of the continent, the hemisphere, the world."

Colonel Nathan William MacChesney outlined the part played by Dean Wigmore in advocating the establishment of the present campus of the university. He also praised Dean Wigmore's ability to recognize teachers of promise and stimulate them to high achievement.

Dean Wigmore's *Treatise on Evidence* was described by Robert W. Millar, professor emeritus of the law school, as "the greatest Anglo-American law book that ever saw the light." It resulted in "an enrichment of the law beyond compare," and established Wigmore as "primate of the field of Evidence."

Professor Millar paid tribute to the many-sided character of Wigmore's contributions to the law, among which was the establishment of the American Institute of Criminal Law and Criminology.

## Colonel MacChesney on Alaskan Trip

COLONEL NATHAN WILLIAM MACCHESNEY, now on duty in the Judge Advocate General's Department, made a recent visit to Alaska in the course of the duties assigned to him. In an address at a meeting of the Military Order of Foreign Wars, at which he was the guest of honor, he gave his impressions of the flight for thousands of miles along the newly completed Alaskan highway, and emphasized the importance of the conflict now going on in the Aleutian Islands.

# THE JUDICIAL COUNCILS OF THE STATES

By GEORGE MAURICE MORRIS

President, American Bar Association

THE "inevitability of graduality" annoys the impatient, but sustains the patient, reformer. The patient reformer is as well satisfied as reformers can be expected to be with the Judicial Conference, or the Judicial Council, idea and its gradual advance. Some of us like to believe that its further advance is inevitable.

The Judicial Council invention has been steadily achieving its probably permanent position as an instrument in our state system of administering justice. That device was a result of the repeated demonstration that bodies of temporary character charged with reforming court systems, procedure, and even with reforming court rules, cannot be relied upon to fix the machinery so that it will stay fixed. The administration of justice is not a matter to which one may give concentrated attention for a limited period and then, with a sigh of relief, turn away from, saying, "Thank goodness! *That's* done."

In the year 1924 the legislatures of Ohio and Massachusetts created state judicial councils. Twenty-eight states and Puerto Rico now have judicial councils. Three states have informal equivalents of these councils. Four of the councils are at the moment inactive or are in the process of reorganization. Through the medium of the National Conference of Judicial Councils, the exchange of ideas and of encouragement which pass among these state groups indicates that the roots of the system are constantly sinking deeper.

The composition of these state councils varies from state to state. Some have as few as six (Rhode Island) and some as many as fifty-two (Kentucky) members. Three of them are composed, as is our circuit conference here, of judges exclusively. Three consist of practicing lawyers exclusively and ten are made up of judges and lawyers together. Eleven include judges, lawyers and legislators. Four have judges, lawyers, legislators and laymen, as such. A member of the faculty of the state law school is prescribed as a member in eleven states.

I asked an informed individual which kind of groups gets the best results. His answer was, "Those councils which have laymen on them. Where either lawyers or judges serve alone they seem to lack the energy for sustained attack. Where judges and lawyers serve together each group seems to have a diffidence about imposing its views upon the other which stultifies action. Where, however, laymen are included, their presence seems to act as an 'ice-breaker' and to stir activity among the professional members of the council. Laymen's criticisms are sharper."

What allowance these observations have made for the very large number of variants in the plan and manner of functioning of these councils, my informant was not asked. Regardless of what that allowance may be, however, the conditions under which the state councils are operating are by no means uniform. In eight states, for instance, there is no appropriation from state funds for the work of these councils. In one state the appropriation has been as great as $50,000 per year. State and local bar associations, law schools and foundations have made contributions in money and personnel to help out some of these councils. The variation in financial aid would alone seem to make for unevenness in accomplishment.

Five of these state councils have paid staffs. Three have had some paid expert help and the remainder appear to have depended for their research and study product upon their own members and law school faculty and students.

Some councils meet once a month (or oftener if necessary). Others meet once a year. Some have devoted themselves to a single project, such as securing adoption of rules of procedure in the courts of the state to conform to the new Federal Rules of Civil Procedure. New Mexico has done that while the council of Puerto Rico has confined itself at the outset to the reorganization of the municipal courts. New York, on the other hand, has a calendar of fifty-two topics while Wisconsin has eleven topics on its agenda.

Annual reports, monographs, study reports, reasoned proposals, etc., are pouring forth from the councils. One group recently published sixteen studies in a single year. As most of the members of this audience probably know, the National Conference of Judicial Councils not only publishes a "Handbook," which in 1942 ran 191 pages, but publishes a number of monographs setting out reforms deemed "necessary to make the administration of justice responsive to the needs of our time." In addition, the National Conference is issuing the *Judicial Administration Series*. These are permanently bound volumes. The contributors include

Address delivered before the Thirteenth Judicial Conference of the Fourth Circuit, Asheville, North Carolina, June 11, 1943.

Director of the Conference Roscoe Pound, George Warren, Professor Robert Wyness Millar, Professor Evan Haynes, Professor James J. Robinson. The objective of this series of books is the making available to legislators, judicial councils, courts and the profession, of the accumulated material relating "to the main problems of judicial administration of justice in America." The Conference does active work in concert with other groups such as the National Committee on Traffic Law Enforcement and the International Association of Chiefs of Police.

But, speaking of the councils themselves rather than their national organization, these groups are not merely interested in publishing books; they get things done. The California Council takes credit for sixty legislative enactments in eleven years. Massachusetts has in excess of fifty acts to its credit. Others (e.g., Arizona and Iowa) cheer when, after years of concentration, they get the rule-making power back into the courts. The legislation these groups sponsor appears, in variety, to touch every aspect of court procedures, processes, pleadings, pre-trial, trial, evidence, judgment, appeal, court fees, court administration, admission to the bar, selecting juries, instructing juries, parole, pardons, code revision, etc., etc. The Temple of Justice is getting an inspection and at least an attempted cleaning-up which apparently exceeds in extent and variety the experience of any of the living ministers to that edifice.

In designating the persons employed to secure their ends, the councils mention: the members of the bar, the judges, the press, the public and the members of the legislature. Media include newspaper releases, notices of public hearings and sessions, publications in bar association periodicals, appearances on bar meeting programs, personal contacts with influential people, public addresses, attending legislative hearings and inducing prominent members of the Bench and Bar to attend such hearings. In short, the councils have adopted the methods which persons of imagination and energy, promoting a cause in the merits of which the protagonists have confidence, may properly employ.

In South Dakota, where the funds to operate the Council come from the treasury of the integrated state bar, all branches of that bar and of the judicial organizations of the state cooperate in promoting the legislative programs. The Council says, "We get what cooperation we need by asking for it." In West Virginia the Council reports its inability to get the supreme court of the state to promulgate rules which are recommended to it, while from Rhode Island comes the report of legislative indifference.

The unevenness of the progress of the Judicial Councils evidences a growth by trial and error. It is another illustration of the laboratory testing process for governmental ideas which our state governments afford. Some proposals work well in one political and social climate but not in another. Out of it all, however, there gradually emerge certain concepts which are accepted virtually everywhere as sound both in principle and in practical operation.

Paul B. DeWitt, the then Secretary of the National Conference of Judicial Councils, pointed out in the Foreword to the Conference's *Handbook for 1941*, that "for a third time within a century the administration of justice is entering a period of reform. The Field Code of 1848, the Judicature Act of 1873 and the adoption of the Federal Rules in 1937 and the formulation of the recommendations of the American Bar Association in 1938 are the milestones which mark this development." His appears to be a sound enough conclusion and it is worth noting that we are a part and parcel of this movement.

This reform movement and the part that the Judicial Conference system of the federal circuits and the Judicial Council system in the states are playing in the promotion of the administration of justice are gratifying. The performance of these agencies is particularly gratifying to those of us who, as judges or lawyers, are interested in the organized bar. In the days of the genesis of the Field Code and even at the time of the Judicature Act of 1873, bar associations in this country were chiefly dinning oratorical and library enterprises. Today the organizations of the bar are potent influences in the formulation of public opinion. In that role the bar associations almost everywhere have supported with enthusiasm and active working effort this judicial council movement. As an example, Judge John J. Parker, the indefatigable chairman of this Conference, and of the American Bar Association's Special Committee on Improving the Administration of Justice, has preached, and is still preaching, the doctrine up and down the land.

As you probably know, the American Bar Association's Junior Bar Conference has conducted, and is still conducting, surveys of administration of the state courts. These surveys supply much of the data upon which the judicial councils function. Without the support of the associations of the bar in most states, the councils in those states would either not have come into being or would not now be operating. One would be justified in saying that if nothing more came from the organized bar movement, that development would have justified itself by its contributions to the promotion of the Judicial Council idea and the consistent support rendered since.

The American Bar Association, in cooperation with state and local bar associations, is making an "all out" war effort. For the first time in our history, the organized bar is following patterns designed to bring specific and concrete aid to the winning of this war. Literally thousands of lawyers all over the country are working on assigned war tasks under the supervision of the organized bar. The entire resources of the

American Bar Association have been pledged to this endeavor. So far as I am aware, we have yet to call on any member of the Association to lend a hand in this war work who has refused. Our real task is to develop sufficient opportunities for the men who wish to help.

Notwithstanding, however, all the enthusiasm and activity which this situation represents, there is still continuing interest of the lawyers in their normal joint activity. This has recently been rather graphically demonstrated. Last March we took a poll of the House of Delegates of the American Bar Association. In that poll, we set out before the members of the House the ten agencies of the Association which we had grouped together as being intimately concerned with the war effort. We asked the members to indicate which of these agencies or committees we could call upon the members actively to promote in their own communities. Each member was asked to designate the order of his choice. Of those persons responding, 54% selected as first choice the Special Committee on Improving the Administration of Justice, 50% picked War Work as first choice, 34% selected the Committee on the Bill of Rights, and the same percentage designated, for first choice, the Committee on Civilian Defense, and so on, *diminuendo*, down the list.

Who could want a much more gratifying endorsement of the work which John Parker and his Committee on Improving the Administration of Justice have been doing?

Results of this poll indicate to me that lawyers are tenacious of idea. They are aware, as Bernard Gavit, General Counsel for the War Manpower Commission, recently said, that "In time of war, emphasis shifts from the ultimate to the immediate," but they have not lost sight of the fact that the always discernible, never shifting responsibility of the organized bar is the promoting of the administration of justice.

A war may be the most absorbing problem of a generation, but the administration of justice is the demanding task of an entire civilization.

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# MILITARY JUSTICE AND TRIAL PROCEDURE

By MAJOR GENERAL MYRON C. CRAMER

The Judge Advocate General

COLONEL John H. Wigmore, of Northwestern University, whose death is mourned by the whole Bench and Bar, shortly before his demise wrote a letter to the Judge Advocate General's Department in which he compared the procedure of courts with that of courts martial. He said:

> In established military trial procedure, three measures are in regular practice, which are lacking in ordinary civilian criminal procedure. First, in felony cases the accused is furnished counsel without charge. Secondly, the accused is furnished gratis one of the three complete transcripts of everything that takes place at the trial. Thirdly, the record of the trial is automatically sent up to the Appellate Tribunal for review, without cost to the accused. Of these three features, the first one is taken care of already by the Public Defender System where it has been established. But the second and third, so far as I know, are totally lacking. I believe that the lack of those two features constitutes an unforgivable defect in our civilian criminal procedure.

It may be well to distinguish military law from two other legal phases of governmental military activity, martial law and military government. Martial law arises from a situation in which, during insurrection or foreign invasion, the normal civil processes fail so that the Government must take emergency action by substituting the military arm as a temporary agency to maintain order at home. Military government is established on hostile soil under war conditions, superseding local law. Our subject of military law deals with the internal organization, functioning, and discipline of the military establishment.

The military law of the United States is considerably older than its Constitution, which provides for military as well as for civil government. For example, Congress is expressly given power, in and by that document, to make rules for the government and regulation of the Army, including militia in federal service, and generally to make all necessary and proper laws to carry out that power. The President is constituted its Commander in Chief, required to commission officers, and generally directed to take care that the laws be faithfully executed.

Our written military law is the successor of many codes, some of which remain for our inspection and edification, some do not, but we find that our principal military offenses, or many of them, are the same as those known to and prosecuted by the Greeks, Romans, Germans and French. The Franco-German system, orig-

Address before the National Conference of Judicial Councils, Philadelphia, Pennsylvania.

inally entrusted to the Chief, or by his delegation to the priests, in its natural development gradually fell under the Colonel or some officer invested with the "regiment"—that is the staff of judicial authority. The French court martial appeared about 1665, the corresponding German institution somewhat earlier.

In England the original of the modern court martial was variously known as the Court of Chivalry, the Court of Arms and the Court of Honor. It will be a sorry day if ever the American court martial forgets that origin or those titles. Its aims and practices can be understood only if one remembers that it is a court of honor, no less than a court of law.

The little volume of hoary and respectable lineage, which has boiled down what we Americans originally learned from the British Army and have since gathered from our own experience in the 167 years of our national existence, "A Manual for Courts Martial, United States Army, 1928," contains only 341 pages, including forms and index. The first 200 in clear and legible type supply a statement of the principles and procedure, so complete, simple and brief that its general effect and the nature of the system created can readily be grasped by a reasonably well-educated person in a night's study. For you it would be light reading. It is the Judge Advocate's Bible. I recommend you to sit down and enjoy it some evening. Then follow the 121 Articles of War in 28 pages of smaller type. The articles as at present in effect are, with comparatively few amendments, as they were adopted by the Congress in 1920 when the lessons of the first World War were still fresh. They are the military commandments of the Government through its elected legislative representatives. The Manual proper is revised from time to time in the office of The Judge Advocate General and published by direction of the President; for military courts, though true courts of law, are conducted under the Constitution as part of the executive and not the judicial function. Changes must be submitted yearly to Congress.

I venture to say you will not find anywhere in the world a more compact or more readily understood body of substantive and procedural law. But please observe it deals with criminal law only, administered by military commissions (e.g., in the saboteur cases), provost courts (as in Hawaii recently) and courts martial.

Although our office assists the Government in many civil matters, courts martial pass on criminal charges alone brought against officers and men of the Army, attached Marine Corps personnel, and other groups relatively too small to require listing here. Their jurisdiction is entirely penal and disciplinary; they have no power to adjudge payment of damages or collect private debts. We have three kinds: Summary courts martial consisting of one officer, which can impose a punishment of confinement for no more than one month, special courts martial of not less than three officers, with power to confine for six months, and general courts martial, whose jurisdiction covers the high, low and middle justice, including crimes punishable by death, dishonorable discharge of an enlisted man and dismissal of an officer. The general court martial is the highest military criminal court of original, and, so far as may be, general and complete jurisdiction.

In view of this fact, and because the field is too large to examine completely, I confine myself to the work of the general court martial. Upon the doings of this court, a creature of the Congress and military agent of the Chief Executive as Commander in Chief, rests primarily the structure of military justice. It consists of at least five officers as experienced as the war-time situation permits, including one law member who makes rulings, and a President whose function is described by his title. It is appointed by the same authority (a commanding officer of high rank) who has, after trial, the duty of reviewing the sentence and the power to approve and confirm, including the power to disapprove the findings, wholly or in part, and to mitigate or remit the whole or any part of the sentence. Members are subject to one peremptory challenge on each side and any number of challenges for cause. The balloting on findings and sentence, after the evidence is all in, is secret. The prosecutor is a trial judge advocate designated for the purpose and possessing the same quasi-judicial duty of fairness to the accused imposed by civilian criminal tribunals on their prosecuting officials.

The accused is protected throughout his prosecution by the same Bill of Rights (with one exception hereafter noted) which takes care of the civilian and the rules of evidence are, generally speaking, the same as those applied in the federal civilian courts. I need scarcely add that his guilt must be proved beyond a reasonable doubt.

Colonel Wigmore has spoken of some other and peculiarly favorable features, such as ease of appeal. Reviews and rehearings, though not technically denominated appeals, serve a similar purpose in a less rigid form. Every general court martial record automatically goes to the office of The Judge Advocate General in Washington, where it is checked for regularity and legality, and in certain cases its validity must be further passed upon by one of four Boards of Review, and then by The Judge Advocate General himself. In the most serious cases the Secretary of War and the President of the United States have the final say before sentence may be executed.

One of the most common sources, I think, of such distrust of the system of military justice is the knowledge that "cases arising in the land and naval forces" are exempted by the Fifth Amendment of the Constitution from the requirement as to presentment and indictment by grand jury. This is the exception to which I previously made reference. I am sure such doubts would be dispelled from the mind of every reasonable person if he knew the ample provision for preliminary investigation which is employed instead.

"Forms for use in connection with General Courts

Martial," are regularly issued by the War Department, the most recent of which was distributed less than a month ago. The endeavor has been to make as nearly foolproof as possible the provisions of law applicable to pre-trial investigation and the record of the trial itself. Under the former head you will find that information must be given to the accused of the nature of the charges against him, the names of the accuser and the witnesses, the fact that the charges are about to be investigated, his right to cross-examine all witnesses and to present, and compel the investigator to help him with, anything he may desire brought out in his own behalf by way of defense or mitigation; he must be told that it is not necessary for him to make any statement with relation to the charges, together with the warning that, if made, it may be used against him. Consideration at this stage must be given to any question of mental defect, derangement or abnormality. After attaching all expected testimony and necessary documents, and a record of any previous convictions, the investigator must certify:

> In arriving at my conclusions, I have considered not only the nature of the offenses and the evidence in this case, but I have likewise considered the age of the accused, his military service, the necessity for preserving the manpower of the Nation in the present emergency, and salvaging all possible military material, and the established policy of the War Department that the trial by General Court Martial will be resorted to only when the charges can be disposed of in no other manner consistent with military discipline.

I assure you that when the Department asks for such a written memorandum, it is not for the purpose of producing a self-serving document, with any intention to make evidence, but is simply employing a device to preserve and make available for the trial the whole truth as far as obtainable and, at the same time, to secure for the accused the safeguards long required by law. In short, here is another example of the adequacy, efficiency and fairness of the system employed.

Even if the commanding officer, who has the power to direct that the charges be tried, receives from the investigator at the close of the preliminary investigation a recommendation for a general court martial, that recommendation may, nevertheless, be disapproved: another precaution against unwarranted prosecution.

The succeeding forms, which apply to the trial itself, are for a similar purpose and, particularly, designed to insure that all important provisions of law are carried out, and all important occurrences noted in permanent form.

Except in the comparatively rare instances where civilian lawyers are employed, if even then, the trial before a military court finds nobody present with any reason whatever to drag out the proceedings; whereas in civilian courts such a motive cannot be entirely eliminated. Looked at from the standpoint of the fact-finding tribunal, a jury of officers, there is of course a desire to secure the ends of good order and military discipline, but also an understanding of the practical problems of the army man on trial. The officer who collects the evidence and helps the prosecution present it is usually a line officer. The chances are that he has regretted the necessity of making charges at all, for he also is a soldier. The whole set-up is as favorable to the accused as it could well be, because the motive to protect an innocent soldier and restore him to his duty is more powerful than any other consideration which could possibly influence the mind of the man's immediate commander or the court. Even the prosecutor is not unfavorably disposed. He escapes some of the motives which might tend to make a district attorney hard and cynical, having no temptation to advance his political fortunes and being free from political or public pressure.

This sort of a trial, preceded by this sort of an investigation, furnishes a practical, intelligent, flexible and humane system of criminal determination and procedure. Why, then, should there be any misunderstanding of its character and objects? Two explanations at once occur to me. The American people understand penal systems, or think they do. But this institution is primarily not penal but disciplinary, and our citizens are not trained to the necessity for discipline. Moreover, they do not understand how so short a trial can be fair, because they are accustomed to great license afforded trial counsel in cases involving the determination of issues so important to the life and liberty of the individual, accompanied by waste of time and a great deal of talk.

It is an exceptional case which requires more than a day to try, and in which trial is not completed within thirty days after confinement.

We have to admit an element of inexperience, in war-time, among the personnel of court, prosecution and defense. Of this deficiency we are keenly aware, and our constant endeavor is to eliminate that by-product of war conditions. You will be patient with this phase, I am sure, for as I said before it is your Army, and those young officers, who have so much to learn in a short time, were civilians only a few months ago.

I think I have given you a fair picture of what happens to the accused officer or enlisted man, from the moment he is charged with a military offense until his sentence is confirmed and ready for execution. But there still remains the principle of clemency implicit in the whole system. The first reviewing authority (the appointing officer), as we have seen, possesses, in effect, a measure of power to exercise it. Every person serving a general court-martial sentence has an absolute right to receive new consideration at the end of six months. Then, quite apart from its duty to examine for legal sufficiency, our Military Justice Division at Washington has the function of initiating clemency recommendation, where the sentence appears unduly severe or inappropriate, and handles recommendations for clemency referred to our office by the Secretary of War and

The Adjutant General.

Perhaps I should add that the War Department does not stop even here, but has provided, in the disciplinary barracks and the rehabilitation centers, reformative, correctional institutions in which hopeful cases are separated from the incorrigibles and sent to one or the other of those institutions for the salvage of the valuable human material, in the interest of the men themselves and to supply an additional pool of experienced manpower. Colonel Stimson, when originally Secretary of War on the Cabinet of President Taft, had much to do with the initiation of this enlightened idea, started as a result in 1915 at Fort Leavenworth by my predecessor Judge Advocate General Crowder, and activated in the nine service commands December 1, 1942. The Disciplinary Barracks has time to take the longer view and to include vocational training; the centers make a quicker turnover for restoration to duty.

The office of The Judge Advocate General at Washington is charged in addition to its other important duties with general supervision of military justice throughout the entire Army wherever its elements are situated. Performance of that duty involves, among other functions, the following:

Interpretation and construction of the Articles of War and the Manual for Courts Martial;

The maintenance of uniformity of punishment imposed by Courts Martial;

Keeping to a minimum the number of trials, and avoidance of unnecessary delay in the disposition of charges;

Advice to the President in many matters, particularly those involving jurisdiction;

Initiation of legislation and changes in the Manual with a view to simplification or other improvement;

Recommendations and advice in connection with operation and conduct of the disciplinary barracks and rehabilitation centers;

Representing the War Department in habeas corpus proceedings brought by prisoners confined under sentences imposed by courts martial; and

Initiation of or participation in the establishment of policies designed to maintain discipline, conserve manpower, and avoid injustice or unnecessary hardships to individuals.

I have attempted, without quoting from or referring unnecessarily to original sources which your own investigation would enable you to read for yourselves, to excite interest in our system of military law and its application, and to guide you in examining further if you wish. We Army lawyers do not venture to force upon you our views, still less to insist that any of our theories and practices are necessarily applicable to your own problems. We do, however, earnestly desire to have it understood, especially in a time of such serious danger and emergency, that we are doing our best to administer properly, promptly, fairly, and in the interest of the American public and its war effort, what we believe is, on the whole, a sound and good body of military law. If I have in any degree succeeded in my purpose, please help us spread the news that our system is not crude or uncivilized; on the contrary that, while firm and efficient, it is neither harsh nor cruel, but thoroughly American in its worthy designs and honorable practices.

# LAWYERS AND THE RENEGOTIATION OF CONTRACTS

By J. HARRY LaBRUM

Lieutenant Colonel, Signal Corps, Army of the United States
Member of the Bar of Philadelphia and District of Columbia

THE Renegotiation of War Contracts Law[1] is a new departure in American jurisprudence. It relies almost entirely on administrative wisdom. Its success in attaining particular objectives is closely related to a practical, business approach. In order to achieve flexibility, the statute has few specific rules or yardsticks.

The views expressed herein are personal and are not to be construed as official or as reflecting those of the War Department or Signal Corps.

1. Sec. 403, Title IV, Public Law No. 528, 77th Congress, 2nd Session, c. 247, approved April 28, 1942; 56 Stat. at Large 245, 41 U.S.C., note prec. Sec. 1; as amended by the Act of October 21, 1942, c. 619, Sec. 801 (a), 26 U.S.C. Act 1942, Par. 801.

There is little of the spectacular in it as regards the victory program; yet it is considered one of the leading factors in accomplishing maximum wartime production. And at the same time private enterprise looks to it to preserve the efficiency of American business for post-war adjustment.

### Terms of Act

Essentially, the law permits the government to recapture, before taxes, that portion of a contractor's profit which is deemed "excessive." Four departments —the War, Navy and Treasury, and Maritime Commission—are required to eliminate excessive profits in their

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WASHINGTON SERVICES TO MEMBERS

*The Supreme Court Opinion Service* will furnish at $1.00 each, copies of opinions by *airmail* as soon as available from the printer. The opinion usually may be had within 24 hours after the decision is announced. The Supreme Court's docket number and the name of the case should both be stated, if known. When these are not known, sufficient description of the case should be given so that it may be readily identified.

*The Document Service* is an additional service to members. It will furnish other current government documents, publications, and reports, available in Washington, on a similar basis, the base charge for each item requested being $1.00. To this will be added the cost of the document, when not obtainable free, and the cost of mailing; both of which, when known to the members, should be added to the $1.00 for each document and enclosed with the request. *Regular mail will be used in this service unless otherwise requested and extra postage added to the remittance.* It is not contemplated that formal bills will be rendered for cost of the publications and postage where these amounts being unknown, are not sent with the request; but the member will be advised of the amount due at the time the material is sent. Requests under both the above services, should be sent to the American Bar Association,, 1152 National Press Building, Washington, D. C.; and all checks drawn to the Association.

# *There is . . . "a time to laugh" . . .*

*Ecclesiastes 3:4*

### A Witness Silences the Judge

A certain judge in Madera, California, was trying a case wherein a woman sought to recover a diamond ring she had in a fond moment given to a gentleman friend.

"When you gave this man this ring, didn't you think him the best ever?" asked the judge.

The woman blushed, hesitated, and finally admitted that she did.

"Now be honest," continued the judge, "didn't you think him the handsomest man you had ever known?"

The woman blushed again and leaned over and whispered something to the judge. Presently he instructed the jury to find for her.

Everybody wondered what it was that the plaintiff had whispered to the judge, but His Honor would not tell. Finally the court stenographer revealed the secret. What the woman had whispered was: "Not half so handsome as you are, judge."

### Ne Sutor Ultra Crepidam

Judge (to the Italian, Ricardo, who was applying for naturalization papers): "Ricardo, how many states are there in the United States?"

Ricardo: "Judge, you know your business, I know my business. How many banans to de bunch?"

### Preliminary Courtesies

First lawyer: "You are a cheat."

Second lawyer: "You are a liar."

Judge: "Now you have identified each other, we will proceed with the case."

### "Great Memory, Little Common Sense"

The young attorney was sent out of town to interview an important client in regard to a case.

Later, the head of his firm received the following telegram: "Have forgotten name of client. Please wire at once."

This was the reply: "Client's name Whitehead. Your name Burkey."

### A Justifiable Deduction

A man in Connecticut has broken with his wife because she kept putting nasty notes in his lunch box. The man works in a war plant where many females are employed. The man would be eating a nice liverwurst sandwich when he would bite into a piece of paper. When he extracted the piece of paper from his teeth and read it, it would have something like this on it:

"If you're eating lunch with that blonde riveter again, I hope you choke."

Wife's terribly jealous it seems.

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# IN THIS ISSUE

**Our Cover**—This is the month in which we are invited to join in a demonstration of our devotion to the flag of our country by displaying that flag on our cover. The foreground of the picture is Fort McHenry, where an event took place which inspired Francis Scott Key's patriotic hymn. Our historian, George R. Farnum, writes of the flag and that incident.

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**Judicial Councils of the States**—President Morris, going about the country during the year to which he has devoted himself in the service of the Association, has had opportunity to observe the judicial councils of many of the states and he writes interestingly and informally on that subject.

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**Lawyers and the Renegotiation of Contracts**—Lt. Col. J. Harry LaBrum discusses renegotiation law and policy—which sooner or later may be a matter of interest in any law office, large or small.

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**New Rules of Federal Criminal Procedure**—Arthur T. Vanderbilt summarizes some of the more important questions presented by the draft which his committee has recently submitted to the Supreme Court of the United States and announces the decision of the Court to permit the tentative draft of the new criminal rules to be submitted to the bench and bar of the United States.

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**Post-War Planning**—While the achievement of victory over the marauding forces which plunged the world into war still remains the first objective of the United States, the plain course of the war toward the victory of the allied nations is turning the thoughts of all toward planning for the peace. This subject was discussed at the last meeting of the House of Delegates and is to be discussed again at the next annual meeting in Chicago on August 23-26. Charles M. Lyman, State Delegate from Connecticut, writes on that subject. The presentation of his views is timely and will be followed in the next succeeding number by a symposium, which will present the views of a number of our members who have given thoughtful consideration to this vital question.

## ANNUAL TOPICAL INDEX

In Volume 62 of the American Bar Association Reports there was printed a complete index of subjects dealt with in the first 23 volumes of the JOURNAL. In Volume 65 of the Reports and subsequent volumes, topical indexes of Volume XXIV of the JOURNAL and of each succeeding volume, have been printed. Reprints are available at $1 each of the topical index of the first 23 volumes.

**Legal Assistance to Military Personnel**—Colonel Edmund Ruffin Beckwith, of New York, has written an impressive account of what the bar has done for those in military service.

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**Realtors and the Unlawful Practice of Law**—One of the questions to be discussed at the next meeting of the House of Delegates involves the objection of the Chicago Bar Association to the so-called "Memphis Resolution." Chairman Edwin M. Otterbourg, of the Committee on Unauthorized Practice of the Law, outlined the history of this resolution in the June issue. In this issue is printed the Chicago Bar's criticism of the resolution.

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**Review of Supreme Court Opinions**—Among the most important of the cases reviewed in this issue are the following:

In *U. S. v. Powelson,* involving condemnation of land by the government for Tennessee Valley Authority, it is held error to include as an element of value, the possibility of the use of that land, for power plant purposes combined with other land which could only be obtained by condemnation under a state statute, it being held that such an element is too speculative for consideration.

In *Federal Communications Commission* v. *NBC,* the Court holds that NBC was a necessary party to administrative proceedings which involved a request by one station for permission to broadcast on a frequency band in which another station had been given prior and exclusive rights, and that the mere right to file a brief and be heard in argument was not a full equivalent of the right to be made a party to the proceeding.

In *Burford v. Sun Oil Co.,* the Court holds that even where diversity of citizenship jurisdiction exists, and a constitutional question is presented, the federal courts of equity should exercise their discretionary power with proper regard to the rightful independence of state governments in carrying out their domestic policy.

Other important cases deal with federal taxation, bankruptcy, and federal procedure.

# CURRENT EVENTS

## Association Award to West Point Cadet

EARL OREN OLMSTEAD, Jr., of Muskogee, Oklahoma, is the 1943 winner of the American Bar Association award to the cadet having the highest standing in law studies of each year's graduating class at the United States Military Academy, West Point. This award was presented for the first time in 1941.

Lieutenant Olmstead is the son of Mr. and Mrs. E. O. Olmstead. He received an honor school appointment to West Point from the Oklahoma Military Academy. He has achieved a high scholastic standing, in addition to participating in many Academy activities. He has been commissioned in the Air Force.

## Eldon R. James Appointed Law Librarian of Congress

THE Library of Congress announces that Eldon R. James, former librarian of the Harvard Law School, has accepted an appointment as Law Librarian, to succeed the late Dr. John T. Vance, who died in Lexington, Kentucky, April 11, 1943. Dr. James received the LL. B. degree from the University of Cincinnati Law School in 1899. For the following twelve years he was engaged in the practice of law. Dr. James was a professor of law at the University of Cincinnati, 1900-12; at the University of Wisconsin, 1912-13; at the University of Minnesota, 1913-14; and dean and professor of law at the University of Missouri, 1914-18.

## Wigmore Memorial Service

INSPIRING tribute was paid to the life and achievements of the late John H. Wigmore, dean emeritus of Northwestern University School of Law, by members of the Bench and Bar at a memorial service held in Chicago, June 11. Kenneth F. Burgess, president of the board of trustees of the university, presided.

Judge Evan A. Evans, of the United States Circuit Court of Appeals, voiced the homage of the judiciary. "There is no appellate court of standing in the land which has not turned for guidance to this scholar and his monumental work on the *Law of Evidence*," said Judge Evans.

Franklyn B. Snyder, president of the university, lauded Dean Wigmore's remarkable ability to continue his productive legal scholarship to the end. "On his eightieth birthday," President Snyder said, "he presented to the University his just-published *Guide to International Law and Practice*, and characterized it with an almost boyish pride as 'My last—no, I mean my latest—work.'"

Charles P. Megan, of Chicago, representing the Bar, pointed out that the difficult field of international law was for Dean Wigmore an absorbing, lifelong interest. "It would seem," said Mr. Megan, "as if everything else that he wrote was a side issue. He was foremost in the establishment of an Inter-American Bar Association. He organized, promoted, publicized, and attended conferences for the exchange of ideas and the working out of plans for cooperation in public and private law among the nations of the continent, the hemisphere, the world."

Colonel Nathan William MacChesney outlined the part played by Dean Wigmore in advocating the establishment of the present campus of the university. He also praised Dean Wigmore's ability to recognize teachers of promise and stimulate them to high achievement.

Dean Wigmore's *Treatise on Evidence* was described by Robert W. Millar, professor emeritus of the law school, as "the greatest Anglo-American law book that ever saw the light." It resulted in "an enrichment of the law beyond compare," and established Wigmore as "primate of the field of Evidence."

Professor Millar paid tribute to the many-sided character of Wigmore's contributions to the law, among which was the establishment of the American Institute of Criminal Law and Criminology.

## Colonel MacChesney on Alaskan Trip

COLONEL NATHAN WILLIAM MACCHESNEY, now on duty in the Judge Advocate General's Department, made a recent visit to Alaska in the course of the duties assigned to him. In an address at a meeting of the Military Order of Foreign Wars, at which he was the guest of honor, he gave his impressions of the flight for thousands of miles along the newly completed Alaskan highway, and emphasized the importance of the conflict now going on in the Aleutian Islands.

# THE JUDICIAL COUNCILS OF THE STATES

By GEORGE MAURICE MORRIS

President, American Bar Association

THE "inevitability of graduality" annoys the impatient, but sustains the patient, reformer. The patient reformer is as well satisfied as reformers can be expected to be with the Judicial Conference, or the Judicial Council, idea and its gradual advance. Some of us like to believe that its further advance is inevitable.

The Judicial Council invention has been steadily achieving its probably permanent position as an instrument in our state system of administering justice. That device was a result of the repeated demonstration that bodies of temporary character charged with reforming court systems, procedure, and even with reforming court rules, cannot be relied upon to fix the machinery so that it will stay fixed. The administration of justice is not a matter to which one may give concentrated attention for a limited period and then, with a sigh of relief, turn away from, saying, "Thank goodness! *That's* done."

In the year 1924 the legislatures of Ohio and Massachusetts created state judicial councils. Twenty-eight states and Puerto Rico now have judicial councils. Three states have informal equivalents of these councils. Four of the councils are at the moment inactive or are in the process of reorganization. Through the medium of the National Conference of Judicial Councils, the exchange of ideas and of encouragement which pass among these state groups indicates that the roots of the system are constantly sinking deeper.

The composition of these state councils varies from state to state. Some have as few as six (Rhode Island) and some as many as fifty-two (Kentucky) members. Three of them are composed, as is our circuit conference here, of judges exclusively. Three consist of practicing lawyers exclusively and ten are made up of judges and lawyers together. Eleven include judges, lawyers and legislators. Four have judges, lawyers, legislators and laymen, as such. A member of the faculty of the state law school is prescribed as a member in eleven states.

I asked an informed individual which kind of groups gets the best results. His answer was, "Those councils which have laymen on them. Where either lawyers or judges serve alone they seem to lack the energy for sustained attack. Where judges and lawyers serve together each group seems to have a diffidence about imposing its views upon the other which stultifies action. Where, however, laymen are included, their presence seems to act as an 'ice-breaker' and to stir activity among the professional members of the council. Laymen's criticisms are sharper."

What allowance these observations have made for the very large number of variants in the plan and manner of functioning of these councils, my informant was not asked. Regardless of what that allowance may be, however, the conditions under which the state councils are operating are by no means uniform. In eight states, for instance, there is no appropriation from state funds for the work of these councils. In one state the appropriation has been as great as $50,000 per year. State and local bar associations, law schools and foundations have made contributions in money and personnel to help out some of these councils. The variation in financial aid would alone seem to make for unevenness in accomplishment.

Five of these state councils have paid staffs. Three have had some paid expert help and the remainder appear to have depended for their research and study product upon their own members and law school faculty and students.

Some councils meet once a month (or oftener if necessary). Others meet once a year. Some have devoted themselves to a single project, such as securing adoption of rules of procedure in the courts of the state to conform to the new Federal Rules of Civil Procedure. New Mexico has done that while the council of Puerto Rico has confined itself at the outset to the reorganization of the municipal courts. New York, on the other hand, has a calendar of fifty-two topics while Wisconsin has eleven topics on its agenda.

Annual reports, monographs, study reports, reasoned proposals, etc., are pouring forth from the councils. One group recently published sixteen studies in a single year. As most of the members of this audience probably know, the National Conference of Judicial Councils not only publishes a "Handbook," which in 1942 ran 191 pages, but publishes a number of monographs setting out reforms deemed "necessary to make the administration of justice responsive to the needs of our time." In addition, the National Conference is issuing the *Judicial Administration Series*. These are permanently bound volumes. The contributors include

Address delivered before the Thirteenth Judicial Conference of the Fourth Circuit, Asheville, North Carolina, June 11, 1943.

Director of the Conference Roscoe Pound, George Warren, Professor Robert Wyness Millar, Professor Evan Haynes, Professor James J. Robinson. The objective of this series of books is the making available to legislators, judicial councils, courts and the profession, of the accumulated material relating "to the main problems of judicial administration of justice in America." The Conference does active work in concert with other groups such as the National Committee on Traffic Law Enforcement and the International Association of Chiefs of Police.

But, speaking of the councils themselves rather than their national organization, these groups are not merely interested in publishing books; they get things done. The California Council takes credit for sixty legislative enactments in eleven years. Massachusetts has in excess of fifty acts to its credit. Others (e.g., Arizona and Iowa) cheer when, after years of concentration, they get the rule-making power back into the courts. The legislation these groups sponsor appears, in variety, to touch every aspect of court procedures, processes, pleadings, pre-trial, trial, evidence, judgment, appeal, court fees, court administration, admission to the bar, selecting juries, instructing juries, parole, pardons, code revision, etc., etc. The Temple of Justice is getting an inspection and at least an attempted cleaning-up which apparently exceeds in extent and variety the experience of any of the living ministers to that edifice.

In designating the persons employed to secure their ends, the councils mention: the members of the bar, the judges, the press, the public and the members of the legislature. Media include newspaper releases, notices of public hearings and sessions, publications in bar association periodicals, appearances on bar meeting programs, personal contacts with influential people, public addresses, attending legislative hearings and inducing prominent members of the Bench and Bar to attend such hearings. In short, the councils have adopted the methods which persons of imagination and energy, promoting a cause in the merits of which the protagonists have confidence, may properly employ.

In South Dakota, where the funds to operate the Council come from the treasury of the integrated state bar, all branches of that bar and of the judicial organizations of the state cooperate in promoting the legislative programs. The Council says, "We get what cooperation we need by asking for it." In West Virginia the Council reports its inability to get the supreme court of the state to promulgate rules which are recommended to it, while from Rhode Island comes the report of legislative indifference.

The unevenness of the progress of the Judicial Councils evidences a growth by trial and error. It is another illustration of the laboratory testing process for governmental ideas which our state governments afford. Some proposals work well in one political and social climate but not in another. Out of it all, however, there gradually emerge certain concepts which are accepted virtually everywhere as sound both in principle and in practical operation.

Paul B. DeWitt, the then Secretary of the National Conference of Judicial Councils, pointed out in the Foreword to the Conference's *Handbook for 1941*, that "for a third time within a century the administration of justice is entering a period of reform. The Field Code of 1848, the Judicature Act of 1873 and the adoption of the Federal Rules in 1937 and the formulation of the recommendations of the American Bar Association in 1938 are the milestones which mark this development." His appears to be a sound enough conclusion and it is worth noting that we are a part and parcel of this movement.

This reform movement and the part that the Judicial Conference system of the federal circuits and the Judicial Council system in the states are playing in the promotion of the administration of justice are gratifying. The performance of these agencies is particularly gratifying to those of us who, as judges or lawyers, are interested in the organized bar. In the days of the genesis of the Field Code and even at the time of the Judicature Act of 1873, bar associations in this country were chiefly dinning oratorical and library enterprises. Today the organizations of the bar are potent influences in the formulation of public opinion. In that role the bar associations almost everywhere have supported with enthusiasm and active working effort this judicial council movement. As an example, Judge John J. Parker, the indefatigable chairman of this Conference, and of the American Bar Association's Special Committee on Improving the Administration of Justice, has preached, and is still preaching, the doctrine up and down the land.

As you probably know, the American Bar Association's Junior Bar Conference has conducted, and is still conducting, surveys of administration of the state courts. These surveys supply much of the data upon which the judicial councils function. Without the support of the associations of the bar in most states, the councils in those states would either not have come into being or would not now be operating. One would be justified in saying that if nothing more came from the organized bar movement, that development would have justified itself by its contributions to the promotion of the Judicial Council idea and the consistent support rendered since.

The American Bar Association, in cooperation with state and local bar associations, is making an "all out" war effort. For the first time in our history, the organized bar is following patterns designed to bring specific and concrete aid to the winning of this war. Literally thousands of lawyers all over the country are working on assigned war tasks under the supervision of the organized bar. The entire resources of the

American Bar Association have been pledged to this endeavor. So far as I am aware, we have yet to call on any member of the Association to lend a hand in this war work who has refused. Our real task is to develop sufficient opportunities for the men who wish to help.

Notwithstanding, however, all the enthusiasm and activity which this situation represents, there is still continuing interest of the lawyers in their normal joint activity. This has recently been rather graphically demonstrated. Last March we took a poll of the House of Delegates of the American Bar Association. In that poll, we set out before the members of the House the ten agencies of the Association which we had grouped together as being intimately concerned with the war effort. We asked the members to indicate which of these agencies or committees we could call upon the members actively to promote in their own communities. Each member was asked to designate the order of his choice. Of those persons responding, 54% selected as first choice the Special Committee on Improving the Administration of Justice, 50% picked War Work as first choice, 34% selected the Committee on the Bill of Rights, and the same percentage designated, for first choice, the Committee on Civilian Defense, and so on, *diminuendo*, down the list.

Who could want a much more gratifying endorsement of the work which John Parker and his Committee on Improving the Administration of Justice have been doing?

Results of this poll indicate to me that lawyers are tenacious of idea. They are aware, as Bernard Gavit, General Counsel for the War Manpower Commission, recently said, that "In time of war, emphasis shifts from the ultimate to the immediate," but they have not lost sight of the fact that the always discernible, never shifting responsibility of the organized bar is the promoting of the administration of justice.

A war may be the most absorbing problem of a generation, but the administration of justice is the demanding task of an entire civilization.

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# MILITARY JUSTICE AND TRIAL PROCEDURE

By MAJOR GENERAL MYRON C. CRAMER

The Judge Advocate General

COLONEL John H. Wigmore, of Northwestern University, whose death is mourned by the whole Bench and Bar, shortly before his demise wrote a letter to the Judge Advocate General's Department in which he compared the procedure of courts with that of courts martial. He said:

> In established military trial procedure, three measures are in regular practice, which are lacking in ordinary civilian criminal procedure. First, in felony cases the accused is furnished counsel without charge. Secondly, the accused is furnished gratis one of the three complete transcripts of everything that takes place at the trial. Thirdly, the record of the trial is automatically sent up to the Appellate Tribunal for review, without cost to the accused. Of these three features, the first one is taken care of already by the Public Defender System where it has been established. But the second and third, so far as I know, are totally lacking. I believe that the lack of those two features constitutes an unforgivable defect in our civilian criminal procedure.

It may be well to distinguish military law from two other legal phases of governmental military activity, martial law and military government. Martial law arises from a situation in which, during insurrection or foreign invasion, the normal civil processes fail so that the Government must take emergency action by substituting the military arm as a temporary agency to maintain order at home. Military government is established on hostile soil under war conditions, superseding local law. Our subject of military law deals with the internal organization, functioning, and discipline of the military establishment.

The military law of the United States is considerably older than its Constitution, which provides for military as well as for civil government. For example, Congress is expressly given power, in and by that document, to make rules for the government and regulation of the Army, including militia in federal service, and generally to make all necessary and proper laws to carry out that power. The President is constituted its Commander in Chief, required to commission officers, and generally directed to take care that the laws be faithfully executed.

Our written military law is the successor of many codes, some of which remain for our inspection and edification, some do not, but we find that our principal military offenses, or many of them, are the same as those known to and prosecuted by the Greeks, Romans, Germans and French. The Franco-German system, orig-

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Address before the National Conference of Judicial Councils, Philadelphia, Pennsylvania.

inally entrusted to the Chief, or by his delegation to the priests, in its natural development gradually fell under the Colonel or some officer invested with the "regiment"—that is the staff of judicial authority. The French court martial appeared about 1665, the corresponding German institution somewhat earlier.

In England the original of the modern court martial was variously known as the Court of Chivalry, the Court of Arms and the Court of Honor. It will be a sorry day if ever the American court martial forgets that origin or those titles. Its aims and practices can be understood only if one remembers that it is a court of honor, no less than a court of law.

The little volume of hoary and respectable lineage, which has boiled down what we Americans originally learned from the British Army and have since gathered from our own experience in the 167 years of our national existence, "A Manual for Courts Martial, United States Army, 1928," contains only 341 pages, including forms and index. The first 200 in clear and legible type supply a statement of the principles and procedure, so complete, simple and brief that its general effect and the nature of the system created can readily be grasped by a reasonably well-educated person in a night's study. For you it would be light reading. It is the Judge Advocate's Bible. I recommend you to sit down and enjoy it some evening. Then follow the 121 Articles of War in 28 pages of smaller type. The articles as at present in effect are, with comparatively few amendments, as they were adopted by the Congress in 1920 when the lessons of the first World War were still fresh. They are the military commandments of the Government through its elected legislative representatives. The Manual proper is revised from time to time in the office of The Judge Advocate General and published by direction of the President; for military courts, though true courts of law, are conducted under the Constitution as part of the executive and not the judicial function. Changes must be submitted yearly to Congress.

I venture to say you will not find anywhere in the world a more compact or more readily understood body of substantive and procedural law. But please observe it deals with criminal law only, administered by military commissions (e.g., in the saboteur cases), provost courts (as in Hawaii recently) and courts martial.

Although our office assists the Government in many civil matters, courts martial pass on criminal charges alone brought against officers and men of the Army, attached Marine Corps personnel, and other groups relatively too small to require listing here. Their jurisdiction is entirely penal and disciplinary; they have no power to adjudge payment of damages or collect private debts. We have three kinds: Summary courts martial consisting of one officer, which can impose a punishment of confinement for no more than one month, special courts martial of not less than three officers, with power to confine for six months, and general courts martial, whose jurisdiction covers the high, low and middle justice, including crimes punishable by death, dishonorable discharge of an enlisted man and dismissal of an officer. The general court martial is the highest military criminal court of original, and, so far as may be, general and complete jurisdiction.

In view of this fact, and because the field is too large to examine completely, I confine myself to the work of the general court martial. Upon the doings of this court, a creature of the Congress and military agent of the Chief Executive as Commander in Chief, rests primarily the structure of military justice. It consists of at least five officers as experienced as the war-time situation permits, including one law member who makes rulings, and a President whose function is described by his title. It is appointed by the same authority (a commanding officer of high rank) who has, after trial, the duty of reviewing the sentence and the power to approve and confirm, including the power to disapprove the findings, wholly or in part, and to mitigate or remit the whole or any part of the sentence. Members are subject to one peremptory challenge on each side and any number of challenges for cause. The balloting on findings and sentence, after the evidence is all in, is secret. The prosecutor is a trial judge advocate designated for the purpose and possessing the same quasi-judicial duty of fairness to the accused imposed by civilian criminal tribunals on their prosecuting officials.

The accused is protected throughout his prosecution by the same Bill of Rights (with one exception hereafter noted) which takes care of the civilian and the rules of evidence are, generally speaking, the same as those applied in the federal civilian courts. I need scarcely add that his guilt must be proved beyond a reasonable doubt.

Colonel Wigmore has spoken of some other and peculiarly favorable features, such as ease of appeal. Reviews and rehearings, though not technically denominated appeals, serve a similar purpose in a less rigid form. Every general court martial record automatically goes to the office of The Judge Advocate General in Washington, where it is checked for regularity and legality, and in certain cases its validity must be further passed upon by one of four Boards of Review, and then by The Judge Advocate General himself. In the most serious cases the Secretary of War and the President of the United States have the final say before sentence may be executed.

One of the most common sources, I think, of such distrust of the system of military justice is the knowledge that "cases arising in the land and naval forces" are exempted by the Fifth Amendment of the Constitution from the requirement as to presentment and indictment by grand jury. This is the exception to which I previously made reference. I am sure such doubts would be dispelled from the mind of every reasonable person if he knew the ample provision for preliminary investigation which is employed instead.

"Forms for use in connection with General Courts

Martial," are regularly issued by the War Department, the most recent of which was distributed less than a month ago. The endeavor has been to make as nearly foolproof as possible the provisions of law applicable to pre-trial investigation and the record of the trial itself. Under the former head you will find that information must be given to the accused of the nature of the charges against him, the names of the accuser and the witnesses, the fact that the charges are about to be investigated, his right to cross-examine all witnesses and to present, and compel the investigator to help him with, anything he may desire brought out in his own behalf by way of defense or mitigation; he must be told that it is not necessary for him to make any statement with relation to the charges, together with the warning that, if made, it may be used against him. Consideration at this stage must be given to any question of mental defect, derangement or abnormality. After attaching all expected testimony and necessary documents, and a record of any previous convictions, the investigator must certify:

> In arriving at my conclusions, I have considered not only the nature of the offenses and the evidence in this case, but I have likewise considered the age of the accused, his military service, the necessity for preserving the manpower of the Nation in the present emergency, and salvaging all possible military material, and the established policy of the War Department that the trial by General Court Martial will be resorted to only when the charges can be disposed of in no other manner consistent with military discipline.

I assure you that when the Department asks for such a written memorandum, it is not for the purpose of producing a self-serving document, with any intention to make evidence, but is simply employing a device to preserve and make available for the trial the whole truth as far as obtainable and, at the same time, to secure for the accused the safeguards long required by law. In short, here is another example of the adequacy, efficiency and fairness of the system employed.

Even if the commanding officer, who has the power to direct that the charges be tried, receives from the investigator at the close of the preliminary investigation a recommendation for a general court martial, that recommendation may, nevertheless, be disapproved: another precaution against unwarranted prosecution.

The succeeding forms, which apply to the trial itself, are for a similar purpose and, particularly, designed to insure that all important provisions of law are carried out, and all important occurrences noted in permanent form.

Except in the comparatively rare instances where civilian lawyers are employed, if even then, the trial before a military court finds nobody present with any reason whatever to drag out the proceedings; whereas in civilian courts such a motive cannot be entirely eliminated. Looked at from the standpoint of the fact-finding tribunal, a jury of officers, there is of course a desire to secure the ends of good order and military discipline, but also an understanding of the practical problems of the army man on trial. The officer who collects the evidence and helps the prosecution present it is usually a line officer. The chances are that he has regretted the necessity of making charges at all, for he also is a soldier. The whole set-up is as favorable to the accused as it could well be, because the motive to protect an innocent soldier and restore him to his duty is more powerful than any other consideration which could possibly influence the mind of the man's immediate commander or the court. Even the prosecutor is not unfavorably disposed. He escapes some of the motives which might tend to make a district attorney hard and cynical, having no temptation to advance his political fortunes and being free from political or public pressure.

This sort of a trial, preceded by this sort of an investigation, furnishes a practical, intelligent, flexible and humane system of criminal determination and procedure. Why, then, should there be any misunderstanding of its character and objects? Two explanations at once occur to me. The American people understand penal systems, or think they do. But this institution is primarily not penal but disciplinary, and our citizens are not trained to the necessity for discipline. Moreover, they do not understand how so short a trial can be fair, because they are accustomed to great license afforded trial counsel in cases involving the determination of issues so important to the life and liberty of the individual, accompanied by waste of time and a great deal of talk.

It is an exceptional case which requires more than a day to try, and in which trial is not completed within thirty days after confinement.

We have to admit an element of inexperience, in war-time, among the personnel of court, prosecution and defense. Of this deficiency we are keenly aware, and our constant endeavor is to eliminate that by-product of war conditions. You will be patient with this phase, I am sure, for as I said before it is your Army, and those young officers, who have so much to learn in a short time, were civilians only a few months ago.

I think I have given you a fair picture of what happens to the accused officer or enlisted man, from the moment he is charged with a military offense until his sentence is confirmed and ready for execution. But there still remains the principle of clemency implicit in the whole system. The first reviewing authority (the appointing officer), as we have seen, possesses, in effect, a measure of power to exercise it. Every person serving a general court-martial sentence has an absolute right to receive new consideration at the end of six months. Then, quite apart from its duty to examine for legal sufficiency, our Military Justice Division at Washington has the function of initiating clemency recommendation, where the sentence appears unduly severe or inappropriate, and handles recommendations for clemency referred to our office by the Secretary of War and

The Adjutant General.

Perhaps I should add that the War Department does not stop even here, but has provided, in the disciplinary barracks and the rehabilitation centers, reformative, correctional institutions in which hopeful cases are separated from the incorrigibles and sent to one or the other of those institutions for the salvage of the valuable human material, in the interest of the men themselves and to supply an additional pool of experienced manpower. Colonel Stimson, when originally Secretary of War on the Cabinet of President Taft, had much to do with the initiation of this enlightened idea, started as a result in 1915 at Fort Leavenworth by my predecessor Judge Advocate General Crowder, and activated in the nine service commands December 1, 1942. The Disciplinary Barracks has time to take the longer view and to include vocational training; the centers make a quicker turnover for restoration to duty.

The office of The Judge Advocate General at Washington is charged in addition to its other important duties with general supervision of military justice throughout the entire Army wherever its elements are situated. Performance of that duty involves, among other functions, the following:

Interpretation and construction of the Articles of War and the Manual for Courts Martial;

The maintenance of uniformity of punishment imposed by Courts Martial;

Keeping to a minimum the number of trials, and avoidance of unnecessary delay in the disposition of charges;

Advice to the President in many matters, particularly those involving jurisdiction;

Initiation of legislation and changes in the Manual with a view to simplification or other improvement;

Recommendations and advice in connection with operation and conduct of the disciplinary barracks and rehabilitation centers;

Representing the War Department in habeas corpus proceedings brought by prisoners confined under sentences imposed by courts martial; and

Initiation of or participation in the establishment of policies designed to maintain discipline, conserve manpower, and avoid injustice or unnecessary hardships to individuals.

I have attempted, without quoting from or referring unnecessarily to original sources which your own investigation would enable you to read for yourselves, to excite interest in our system of military law and its application, and to guide you in examining further if you wish. We Army lawyers do not venture to force upon you our views, still less to insist that any of our theories and practices are necessarily applicable to your own problems. We do, however, earnestly desire to have it understood, especially in a time of such serious danger and emergency, that we are doing our best to administer properly, promptly, fairly, and in the interest of the American public and its war effort, what we believe is, on the whole, a sound and good body of military law. If I have in any degree succeeded in my purpose, please help us spread the news that our system is not crude or uncivilized; on the contrary that, while firm and efficient, it is neither harsh nor cruel, but thoroughly American in its worthy designs and honorable practices.

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# LAWYERS AND THE RENEGOTIATION OF CONTRACTS

By J. HARRY LaBRUM

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THE Renegotiation of War Contracts Law[1] is a new departure in American jurisprudence. It relies almost entirely on administrative wisdom. Its success in attaining particular objectives is closely related to a practical, business approach. In order to achieve flexibility, the statute has few specific rules or yardsticks.

There is little of the spectacular in it as regards the victory program; yet it is considered one of the leading factors in accomplishing maximum wartime production. And at the same time private enterprise looks to it to preserve the efficiency of American business for post-war adjustment.

### Terms of Act

Essentially, the law permits the government to recapture, before taxes, that portion of a contractor's profit which is deemed "excessive." Four departments —the War, Navy and Treasury, and Maritime Commission—are required to eliminate excessive profits in their

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The views expressed herein are personal and are not to be construed as official or as reflecting those of the War Department or Signal Corps.

1. Sec. 403, Title IV, Public Law No. 528, 77th Congress, 2nd Session, c. 247, approved April 28, 1942; 56 Stat. at Large 245, 41 U.S.C., note prec. Sec. 1; as amended by the Act of October 21, 1942, c. 619, Sec. 801 (a), 26 U.S.C. Act 1942, Par. 801.

contracts or subcontracts. A contract provision requiring renegotiation is mandatory in each contract or subcontract in excess of $100,000. Subcontractors of all tiers may be renegotiated, no matter how far removed from the original prime contract. Authority is given to the Secretary of the Department involved to refix the contract price. Renegotiation may be by individual contract; or it may cover the war business of a contractor for the fiscal year.

### Other Plans of Profit Limitation on War Contracts

During World War I, resort was had to the practice of using a cost-plus type of contract. This method proved very unsatisfactory[2] and in the First War Powers Act[3] this form of contract was specifically prohibited.

Beginning in 1934, legislation was enacted limiting profits to a fixed percentage of the contract price. The first of these statutes was the Vinsom Trammel Act,[4] which limited profits on contracts for naval vessels and naval aircraft to 10% of the contract price.

In 1940, legislative preference veered to the excess profits tax method of controlling profits. The Second Revenue Act of 1940[5] suspended the successive profit limitation statutes which had been enacted beginning with the Vinson Trammel Act.

Prior to 1941 various statutory safeguards existed limiting the right of government procurement.[6] The First War Powers Act authorized the President to permit a department to negotiate contracts without regard to these statutory restrictions, whenever this would facilitate the prosecution of the war. The Second War Powers Act[7] authorized the President to designate departments to inspect the plants and audit the books and records of any contractor or subcontractor with whom a defense contract had been placed. By Executive Order[8] the President designated among others the War Department, Navy Department, Treasury Department and Maritime Commission as the departments empowered to inspect and audit "to prevent the accumulation of unreasonable profits." Under this authority, the War and Navy Departments and Maritime Commission on April 25, 1942,[9] established Cost Analysis Sections and Price Adjustment Boards. The Price Adjustment Boards were to aid in securing voluntary refunds whenever profits were deemed excessive. This formal procedure confirmed a practice already in existence. This consisted of negotiations between contracting officers and contractors looking to readjustment of prices on contracts entered into without adequate cost experience.

In the early part of 1942, impetus was given to Congressional consideration of further legislation to combat profiteering by the decision of the Supreme Court in the *Bethlehem Steel* case.[10] The dictum in that case to the effect—

> If the executive is in need of additional laws by which to protect the nation against war profiteering the Constitution has given to Congress, not to this Court, the power to make them.

brought home to Congress the fact that it had a duty to control profits on War Contracts by legislation which had every possibility of being upheld constitutionally.

Then the Jack and Heintz case broke.[11] After the Congressional investigation became a source of public gossip, renegotiation was already on its way to enactment into law.

### Legislative History of Renegotiation Law

The origin of the present law was a proposal to limit profits on war contracts to 6%.[12] The War and Navy Departments objected. A flat limitation of profits, it was pointed out, afforded no incentive to reduce costs; gave no reward to low-cost producers; and was too inflexible to take into consideration the many factors which go into successful production of war material. A flat profit limitation was envisaged as a return to the discredited cost-plus contract of World War I. Administration leaders proposed as an alternative a completely flexible and voluntary procedure which would permit readjustment and renegotiation of contract prices without being hampered by any fixed rules or profit percentages. As finally approved, the Act gives the Secretary of each of the four named Departments the right to refix the contract price; not merely the right to negotiate.

### Administration of Act

The answer to whether or not a particular contractor's profits are excessive depends upon the consideration of a variety of factors. How much capital has the contractor invested in his war business? How much money has been spent in converting from peacetime to wartime products? How efficient has the contractor been in his productive process? What was the contractor's profit record during representative peace years? How has the contractor's change to war products affected his prospects for post-war peacetime production? What contribution has the contractor made by assignment of patents, transfer of control of production methods, and the like, to the war effort? Has he contributed his "know-how" to possible competitors in order to aid the war effort? How do the profits earned by this contractor compare with those earned by other contractors in the same line of business? How do they com-

2. *See* "War Contracts and Profit Limitation" by Buel W. Patch, in *Editorial Research Reports*, Vol. 11, No. 16, Nov. 16, 1942, p. 279 *et seq.*
3. Act of Dec. 18, 1941, Public Law 354, 77th Congress.
4. 48 Stat. 503, 34 U.S.C.A., Sec. 494.
5. 54 Stat. 1003 (1940), 34 U.S.C.A., Sec. 496a.
6. These statutes are discussed in Opinion of Attorney General of August 29, 1942, construing the First War Powers Act and Executive Order 9001.
7. Public Law No. 507, 77th Congress, 2nd Session.
8. Executive Order 9127, April 24, 1942, 7 Fed. Reg. 2753.
9. W.P.B. Release No. 1017, April 30, 1942.
10. *United States v. Bethlehem Steel Corp.; Bethlehem Shipbuilding Corp. v. United States;* 315 U. S. 289; 62 Sup. Ct. Rep. 581; 86 L. ed. 521 (1942).
11. *See* Hearings before Committee on Naval Affairs on H.R. 6790 (The Smith Bill) 77th Congress, 2nd Session, 2625-26, 2670-2681.
12. The Case Amendment to H.R. 6868, which was passed by the House on March 28, 1942; 88 Cong. Rec. 3202, 3231.

pare with other war contractors generally? These and others are the many factors which must be considered.

For this purpose certain administrative machinery has been set up.[13] A Price Adjustment Board represents each of the four Departments involved. The War Department differs from the other three agencies in actual operation. The War Department Price Adjustment Board is *not* primarily an operating unit. It is concerned chiefly with policy; general supervision of renegotiation; the assignment of cases to subdivisions for the actual operations of renegotiation; and the final approval of completed renegotiation proceedings. The actual work of renegotiation is conducted by some forty-five Price Adjustment Sections which have been established in each of the Services of Supply of the Army Service Forces, and in the Materiel Command of the Army Air Forces.

Unlike the War Department, the Price Adjustment Boards of the Navy, Treasury, and Maritime Commission are *operating* units. The Navy Price Adjustment Board has three regional offices, located in San Francisco, Chicago and New York. The Treasury Department and Maritime Commission have not yet subdivided their activities.

By agreement among the boards, that department which represents the largest dollar amount of the contractor's business—prime contract, subcontracts or both—renegotiates as agent for all of the departments. If the War Department is assigned a contractor, he is renegotiated by that Price Adjustment Section—Engineers, Ordnance, Signal Corps, etc.—which accounts for the largest volume of the contractor's business.

### Practical Legal Problems

*a. Subcontracts*

The Vinson-Trammel Act of 1934, like the present Renegotiation of War Contracts Law, also dealt with subcontracts. However, a narrow interpretation of the term "subcontract" was applied under the Act in the Aluminum Company case.[14] Standard commercial articles were held not to be included in the term "subcontract."

By contrast the provisions of the renegotiation law dealing with subcontracts are wide and all-inclusive. It has been interpreted to include subcontractors of all tiers; and to include standard commercial articles.[15]

By the definition of "subcontract" in the renegotiation law, the term "article" includes material, part, assembly, or "other *personal* property." The departmental interpretation excludes from renegotiation a subcontract which covers real property; or improvements thereon; or equipment designed to become a part thereof. However, a prime contract involving real property is still subject to renegotiation.

How much of a contractor's business is subject to renegotiation? This may prove to be a difficult question in the case of a subcontractor several tiers removed from the prime contractor. The subcontractor may in some cases furnish standard commercial fabricated items, where it may be difficult, if not impossible, to allocate sales between renegotiable and non-renegotiable business.

By departmental interpretation,[16] it is not necessary to submit a complete analysis of all sales in order to arrive at a segregation of the two types of business. The boards allow a reasonably intelligent estimate to be made. This can be based on priority ratings, end use of the product, test checks of a portion of the period, or any other reasonably intelligent index.

*b. Excessive Profits*

Most of the controversy which has raged around the renegotiation law concerns the meaning of "excessive profits."

The Act defines excessive profits as: "Any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits." Renegotiation is defined in the Act to " . . . include the *refixing* by the Secretary of the Department of the contract price."

Various attempts have been made to describe "excessive profits." Thus, the War Department Price Adjustment Board[17] defines them as "those inordinate, unjustified or perhaps unanticipated profits which reasonable men would agree the contractor should not retain." Excessive profits have also been defined as the amount of profits which exceed a fair margin under all the circumstances.[18]

There is no exact legislative definition of the term "excessive profits." However, a sketchy framework has been provided in the renegotiation law. Thus "In . . . determining excessive profits the Secretaries . . . shall not make any allowances for any salaries, bonuses or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount" . . . "In determining the excessiveness of profits . . . the Secretaries shall recognize the *properly applicable* exclusions and deductions *of the character* . . . allowed under . . . the Internal Revenue Code." The War Department Price Adjustment Board[19] has interpreted the words "of the character" as negativing any requirement that the Price Adjustment Board must nec-

13. *See* Carman G. Blough: "Mechanics of Renegotiation," in *Journal of Accountancy*, March, 1943, p. 200 *et seq.*

14. *Aluminum Co. v. Commissioner of Internal Revenue*, 47 U. S. Board of Tax Appeals 543 (Aug. 13, 1942).

15. *See* Lt. Col. Chas. H. Dyson: "Renegotiation of Government Contracts—U. S. Army Organization and Procedure" in *New York Certified Public Accountant*, Vol. XIII, May, 1943, pp. 304, 307.

16. *See* "Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission of Purposes, Principles, Policies and Interpretations under Sec. 403 of the Sixth Supplemental National Defense Appropriations Act., 1942, as amended," dated March 31, 1943 p. 10.

17. War Department Price Adjustment Board Instructions numbered PAB-5, quoted in Prentice Hall *Government Contracts*, Par. 25, 346.

18 *Op. cit., supra*, note 15; p. 7.

19. "Principles, Policies and Procedures to be followed in Renegotiation" issued by War Department, quoted in Prentice Hall *Government Contracts*, Par. 25, 211.

essarily allow the actual amount of exclusions and deductions which the Bureau of Internal Revenue would permit.

*c. Before Taxes*

The Price Adjustment Boards have concluded that profits subject to renegotiation are those *before* taxes. The theory is that taxation is the duty of Congress; that the rate of tax is a determination by Congress of what a company should contribute to the war effort out of its net profits; that therefore the Price Adjustment Boards have no authority to consider profits after taxes. The rule, however, has been relaxed in some cases where companies have little or no tax base, and the effect of income and excess profits tax is unusually severe. Here profits after taxes may be taken into consideration in renegotiation.[20]

*d. Contracts Entered into Prior to April 28, 1942.*

The Act prescribes renegotiation for all contracts except those for which final payment was made prior to April 28, 1942. The departments usually apply this provision in a practical businesslike way. Technically any contract on which final payment was not made until after April 28, 1942, is subject to renegotiation under the law. However, if the contract was completed and delivery made, the mere fact that a small amount remained unpaid on April 28, 1942, would not be used by the various boards as a reason why they should renegotiate that particular contract. On questions of reorders and optional agreements the test applied is: Has a new or additional promise been given by the contractor concerning the additional order, or is the additional quantity covered by an option under the original contract? If no new promise or obligation has been made, then the entire contract is renegotiable. On the other hand, if the new delivery represents a new undertaking, then only that portion of the contract is subject to renegotiation.

*e. Contracting Officer and Price Adjustment Board*

Contractors at times are puzzled by a seeming duplication of effort by governmental agencies. A contract may be renegotiated by a contracting officer and later the contract may be renegotiated on an over-all basis by a price adjustment section or board.

This arises out of the fact that the contracting officer, under the wide powers granted him by the First War Powers Act and Executive Order No. 9001, was obligated to see that fair and reasonable prices were paid for the material purchased. The objective, however, was quantity and speed of production. Limitation of profits at the time was secondary. Cost experience was limited. Production experience in many cases did not exist. If it did exist, it embraced quantities much smaller than the vast procurement program actually undertaken. Hence arose the practice of negotiations for voluntary refunds and reductions in price, once cost experience was known.

Under the Renegotiation Act, the Price Adjustment Boards, with the Secretaries of the Departments, have the power to compel reductions in contract prices. This power can in turn now be delegated to contracting officers. They are limited, however, to those cases not taken by the Price Adjustment Sections. The latter can withdraw from the contracting officer this authority to renegotiate contracts during over-all renegotiation proceedings by the price adjustment sections or boards. Once a company is assigned for over-all renegotiation, the contracting officer loses his authority to renegotiate individual contracts completed or partly completed in that fiscal or calendar year. However, in order to encourage contractors to make voluntary adjustments on all contracts, contracting officers have been given the power to accept such reductions at any time, even during over-all renegotiation before a Price Adjustment Section. The practice is for Price Adjustment Sections to issue orders to the contracting officer directing him to refrain from renegotiating with a particular contractor during over-all renegotiation.

*f. Post-War Conversion*

A source of difficulty is the question of reserves for post-war conversion. Initial costs of converting from peacetime to war activities are generally allowed. The return trip from war to peace activities may also entail expenses in the future. These are at present not allowed as costs against the various contracts on the ground that they are too ephemeral.[21]

*g. Losses from Prior Years*

Deduction of operating losses from income during years preceding 1942, as provided for in Section 122 of the Internal Revenue Code, is not a proper deduction for renegotiation purposes. However, where the loss is attributable to renegotiable contracts, it may be considered; but it will not be allowed where it is due to commercial business or to contracts not subject to renegotiation.[22]

*h. Limitations*

The Act permits a contractor to file financial statements for any prior fiscal year or years. If this is done, the Secretary of each Department must give written notice within one year thereafter of a date and place of an initial renegotiation conference. This conference must be held within *60 days* of the date of notice; otherwise the contractor is relieved of renegotiation.[23]

Another section of the Act provides that renegotiation may not be *commenced* more than one year after the close of the contractor's fiscal year within which completion or termination of the contract occurred. "Completion" of the contract has been defined as delivery by the contractor and acceptance by the government; not necessarily payment. "Commencement"

20. *Op. cit., supra,* Note 17.
21. *Op. cit., supra,* Note 16, paragraph J-PAB-6, quoted in Prentice Hall *Government Contracts* Par. 25, 137.
22. *Ibid.* J-PAB-5, quoted in same work, Par. 25, 136.2.
23. *See* "Joint Regulation"—concerning financial statements issued Feb. 1, 1943; reported in CCH War Law Service—*Government Contracts* Par. 27, 295.10 *et seq.*

of renegotiation has been interpreted to mean the date set by the Board for the initial renegotiation conference.

*i. Royalties*

By Public Law No. 768, 77th Congress,[24] whenever an invention is manufactured for the United States with a license from the owner and such license provides for payment of royalties, if the amounts of royalties are believed by the head of the Department or agency, to be unreasonable or excessive he is required to notify the licensor and licensee and to fix such rate of royalty as he shall determine is fair and just. In renegotiation proceedings, royalties appear as items of cost. The allowance of costs for this item is limited by such order as may exist which fixes the amount of royalties under the Royalties statute. Even in the absence of an order fixing royalties, renegotiation authorities must consider whether the royalty cost is fair and reasonable under the cimcumstances.[25]

### Pending Legislation on Renegotiation

*A. The Truman Committee Bill (H. R. 2324)*

A comprehensive examination has been made by the Truman Committee[26] covering renegotiation; its functions, history, and administrative problems.

Following the Committee's report,[27] a Bill (H. R. 2324) was introduced on March 29, 1943, in the House, effecting two amendments in the Renegotiation Act. These are:

1. Requiring contractors and subcontractors to file financial statements for each fiscal year, and

2. Increasing the over-all exemption from $100,000 to $500,000.

The Bill was referred to the House Committee on Ways and Means, which has not yet reported it out of committee.

*B. Vinson Bill (H. R. 1900)*

In the summer of 1942, a Congressional committee began hearing evidence of contingent fees and commissions in exorbitant amounts being received by sales representatives or "war brokers" for obtaining government business.

Bill H. R. 1900 seeks to correct this situation. As finally reported out by Committee,[28] the Bill amends the Renegotiation Act by adding to the present definition of "subcontract" any arrangement to pay any amount contingent upon the procurement of a war contract. Exemption is provided for contractors who do not gross more than $25,000 for the fiscal year.

This Bill was passed by the House on April 20, 1943, and has been reported favorably by the Senate Committee.[29]

### Conclusion—Our Job as Lawyers

How can we as lawyers best do our job? Obviously, to serve adequately we must be adequately informed. To be competent advisers, it behooves us to absorb fully what has already been said on the subject. The future development of this field has its roots in the material now at hand. We may not agree with the principle of renegotiation; we may in fact thoroughly disapprove it. But of one thing we may be certain. Renegotiation, or an equivalent safeguard against excessive profits on war contracts, is here to stay. We must, therefore, know and understand all that has occurred. Then only can we truly fulfill our responsibilities as lawyers to our particular client—contractor or the government—to ourselves, and to our country.

24. Act of Oct. 31, 1942, P.L. 768, 77th Congress.
25. *Op. cit., supra,* note 17, numbered J-PAB-7, quoted in Prentice Hall *Government Contracts,* Par. 25, 138.
26. "Special Committee Investigating the National Defense Program" pursuant to S. Res. 71 (77th Congress).
27. "Additional Report of the Special Committee Investigating the National Defense Program"—Report No. 10, Part 5.
28. *See* Report No. 353, House of Representatives, 78th Congress, 1st Session, (April 12, 1943).
29. Senate Report No. 255, 78th Congress, 1st Session.

# NEW RULES OF FEDERAL CRIMINAL PROCEDURE

By ARTHUR T. VANDERBILT

Chairman, Advisory Committee on Federal Rules of Criminal Procedure

THE success achieved by the new Federal Rules of Civil Procedure accentuated the desirability of attaining a similar result in the field of federal criminal procedure through the delegation of rule-making power to the Supreme Court to be followed by a set of rules introducing a simple, uniform procedure throughout the entire federal judicial structure. The Supreme Court had been previously granted such authority in respect to appellate procedure in criminal cases. The Act of June 29, 1940, conferred on the Court the same power in respect to preliminary and trial procedure. It may be interesting to observe that the enactment of this statute completed the delegation to the Supreme Court of a rounded and complete rule-making power in every field of federal practice and procedure. In the early days of the Republic this power was granted by the Congress to the Supreme Court in respect to equity and admiralty procedure. The Bankruptcy Act contains a similar provision in respect to bankruptcy proceedings. The Act of June 19, 1934, vested like authority in respect to civil actions at law. In 1940 the circle was completed by reposing in the Supreme Court, rule-making power in the entire field of criminal procedure.

In the exercise of the rule-making power for criminal cases the Supreme Court adopted the same course that it had pursued in framing rules of civil procedure. On February 3, 1941, it appointed an Advisory Committee to prepare a draft of the rules of criminal procedure. This committee is composed of seventeen members, well distributed geographically. It numbers several former judges of great experience and outstanding reputation; lawyers who have been prosecutors and lawyers who have been defense counsel; lawyers whose experience is practical and some whose background has been academic. The divergent points of view represented are well adapted to mold a procedural code that should meet the needs of the times.

The committee organized a staff and after some of the basic research was completed it proceeded to prepare a preliminary draft of the rules. The committee has held a considerable number of meetings, each lasting several days, at which successive drafts of every proposed rule were intensively studied and thoroughly debated, both as to substance and as to form. Probably as much time was devoted to matters which the committee finally decided to exclude from treatment in the rules as was given to the framing of the rules that are found in the preliminary draft. Consequently, any reader of the preliminary draft who finds the rules silent as to some topic which he deems should be included should not assume that the point was overlooked, ignored or forgotten. More likely, it was determined after considerable discussion that the general rules should not deal with the point but that it should be left to local rules.

The committee completed a preliminary draft of the rules and submitted it to the Supreme Court with the request for authority to publish and circulate it among members of the Bench and Bar for criticisms and suggestions. This authority has been granted. The Court has not considered the draft on its merits and is not expected to do so until after the committee renders its final report. It is the purpose of the committee to give thorough consideration to comments and recommendations that may be received by it and then to hold further meetings for the purpose of revising the preliminary draft in the light of the material forthcoming in this manner. After this process is completed the committee hopes to be in a position to submit a final draft of Rules of Federal Criminal Procedure to the Supreme Court for its consideration on the merits.

Some time ago each Senior Circuit Judge was requested to cause a committee of the bar to be appointed in each district within his circuit. These committees have been created and are expected to make an intensive study of the draft and submit their comments thereon to the Advisory Committee. In addition, plans are being made to discuss the preliminary draft at judicial conferences of the various circuits. The various bar associations, including the American Bar Association, the state bar associations, and city and county bar associations, are urged to consider the draft and to give to the Advisory Committee the benefit of their advice. Suggestions will also be welcomed from individual members of the Bench and Bar. The framing of the rules will thus be a truly co-operative effort. The result will be a product of the legal profession as a whole.

In drafting the rules, the committee has been guided by two basic principles. First, its purpose has been to provide a simple procedure devoid of technicalities, which would make possible the expeditious disposition of criminal cases, both from the standpoint of the prosecution and the defense. An endeavor has been made to reduce to a minimum many of the technicalities that originated in the period when every crime of greater

gravity than petty theft was punishable by hanging and which have become outmoded and meaningless. The second principle that has governed the deliberations of the committee was the necessity of preserving unimpaired and of strengthening where essential and desirable those rights of a defendant which are regarded as basic in the Anglo-American conception of criminal justice. Further, it was felt that to avoid undue rigidity unnecessary details that might well be left to individual courts and judges should be omitted, without, however, sacrificing precision. This treatment of the subject was indispensable in order to make the rules sufficiently general and flexible to be equally suitable to rural sections, medium sized cities, and large metropolitan centers. As to form, the endeavor has been to make the rules brief and concise, clear and lucid, without any ambiguities or abstruse statements.

It is the purpose of the rules to cover the entire field of criminal procedure. They are arranged, insofar as possible, in chronological order from the institution of a criminal prosecution to its conclusion, including appeals. Necessarily, many of the rules are but restatements of existing practice and are included for the sake of summarizing the entire practice in one place. Space does not permit a detailed consideration of each rule. I shall refer briefly, however, to a few of the important provisions, especially those that represent changes in existing law or which constitute innovations.

The rules propose the abolition of pleas in abatement, demurrers, notions to quash and pleas in bar. All defenses and objections which are now interposed by any one of the foregoing methods would hereafter be raised by a motion, in which all preliminary defenses and objections would have to be consolidated. (Rule 13.) In this respect, the proposed procedure is somewhat similar to that prescribed by Rule 12 of the Rules of Civil Procedure.

A simple form of indictment is proposed which constitutes a compromise between the present prolix document and the extremely short form. The objection to the latter is that it almost invariably evokes a motion for a bill of particulars and thereby is productive of delay. The form preferred by the committee is one that states the essential facts constituting the offense but omits the formal averments and useless embellishments with which old-time draftsmen have been wont to adorn their product. (Rule 8.) As an illustration, the following is the proposed indictment for murder in the first degree committed on a federal reservation:

> The grand jury charges:
>
> On or about the 6th day of January, 1941, at New York City, in the Southern District of New York, and on lands acquired for the use of the United States and under the exclusive jurisdiction of the United States, John Doe, with premeditation shot and murdered John Roe.
>
> A True Bill

The rules introduce the use of a summons as a substitute for a warrant in cases in which an arrest is unnecessary to bring about the appearance of the defendant. (Rules 4 and 10.)

An adaptation of pre-trial procedure to criminal cases is proposed, with such modifications, however, as would prevent any prejudice to the defendant's rights. (Rule 16.)

Provision is made for notice of defense of alibi. (Rule 17.)

The rules propose to expand the present procedure for the taking of depositions. The government would be granted this privilege with the right of confrontation safeguarded by requiring the production of the defendant at the taking of the deposition if he is in custody and by paying his travel expenses if he is not incarcerated. (Rule 18.)

Express provision is made to permit the defendant to waive indictment and to consent to prosecution by information. (Rule 8-B.) This provision is of particular importance in those districts, constituting a majority, where the grand jury convenes two or four times a year. In such jurisdictions a defendant who is unable to give bail may be confined in jail for several months awaiting a grand jury to convene although he expects to plead guilty and is anxious for an expeditious disposition of the case. (Rule 4.)

One of the important rules proposed by the committee is that relating to evidence in criminal cases. It provides that the admissibility of evidence, except when an Act of Congress or the rules otherwise provide, shall be governed by the principles of the common law as interpreted by the courts of the United States. The committee contemplated that this formula would make possible the development of a body of federal law governing the admissibility of evidence in criminal cases. In this respect, the committee adopted a different approach than that disclosed in the civil rules (see Civil Rule 43), since on this point considerations that prevail in civil cases are not necessarily applicable to criminal procedure.

The motion for judgment notwithstanding the verdict, which received sanction in Civil Rule 50, is introduced into criminal procedure in a slightly different form. The motion for a directed verdict is denominated, what it really is, a motion for judgment of acquittal. (Rule 27.)

Exceptions are abolished (Rule 47), the civil rule on the subject being accepted practically verbatim.

Provision is made for effectuating the constitutional right of counsel and for assignment of counsel to the defendant unless he elects to proceed without counsel or is able to obtain counsel of his choice. (Rule 39.)

Detailed provisions are included for pre-sentence investigations by probation officers in order to supply the trial judge with adequate information to assist him in imposing sentence. (Rule 30 (c).)

Lawyers who are not acquainted with the intricacies of federal procedure are at times surprised to learn that it makes no provision for change of venue. The committee has endeavored to remedy this omission by

including a rule permitting a change of venue if it appears that the defendant cannot obtain a fair and impartial trial in the district or division in which the case is pending. (Rule 40 (c) (2).)

A defendant who is arrested in a district other than that in which the prosecution has been instituted and who desires to plead guilty, would be permitted at his election to do so in the jurisdiction in which he is taken into custody, subject to the approval of the United States Attorneys for the two districts concerned. (Rule 40 (c) (1).)

Some of the present uncertainties and technicalities surrounding removal procedure would be eliminated and a uniform, simple method for removing a defendant from the place where he is arrested to the place where the prosecution is pending, would be substituted. (Rule 32.)

Appellate procedure would be simplified and assimilated to that prevailing in civil cases. Bills of exceptions would be abolished and the record prepared in the same manner as in civil actions. (Rules 35 and 37.)

The committee has adopted the rule which originated in the Fourth Circuit, which does away with the printing of the record on appeal, and merely requires each party to print, in an appendix to his brief, such parts of the record as he desires the court to read. This rule has been in successful operation in a number of circuits and has saved much useless printing expense. (Rule 37 (b) (2).)

The Advisory Committee, in submitting the preliminary draft to its professional brethren, earnestly requests their collaboration and co-operation by making a study of the draft and submitting frank criticisms and constructive suggestions.

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# LETTER TO LAW ALUMNI OF THE UNIVERSITY OF ILLINOIS

YOU will want to know how legal education is affected. . . . Today law school enrollments the country over are probably less than one-sixth of what they were in 1938. By next fall the indications are that this company will have dwindled yet further—indeed, almost to the vanishing point—for we can anticipate that it will then be restricted, with few exceptions, to men classified in IV-F, and women. . . .

So much for the present. Now may we take a brief look at the future. My observations here are, of course, speculative. Three factors have a bearing on the situation. Law school enrollments began decreasing in 1938 and even before that. Our first factor then is that the schools have for some years been providing a decreasing number of recruits for the profession and that it is to be anticipated that this supply in another year will well-nigh be depleted. There thus exists an extended gap in which the schools are not furnishing their normal yearly quota of recruits to the profession. Factor two is that in these years the usual quota of older lawyers is passing from the scene through death and retirement. But in these critical years still another factor, the third in this sequence, and one that probably will have an important bearing on the question, has made its appearance. A growing number of lawyers, that can now be described as in the thousands, are being drawn into the civilian branches of government service. These lawyers will not return to private practice in appreciable numbers after the war but will be retained with the government. I lay claim to no gift of prophecy in saying that in my judgment the most critical shortage of lawyers has not yet been reached. But enough of these speculations and of statistical data; significant though they be, there are more momentous problems that hold our thoughts today. . . .

As I view it, we are passing through a period in which materialism, and in some parts of the world, crass materialism, rules the emotions and actions of men. They are placing their faith in brute force and they worship a mechanical god. No one would wish to disparage science and technology, but they should be made to serve the ends of man and not be the ends in themselves. If we gain nothing more from this holocaust than the establishment of a sense of values, our lives would be definitely enriched. If men are to live with one another, they must seek to maintain the ascendancy of the eternal verities—the ascendancy of the good, the true and the beautiful. In our profession these aims find expression in the search for justice and the effort to establish a legal order that is consonant with justice.

We in the legal profession cannot, I believe, escape the implications of these aims and cannot fail to give them our support. It is of the very essence that a lawyer, worthy of the name, believe in the supremacy of law—in a legal order that has, as its goal, the dispensation of justice. It is because I adhere to these premises that I gave support to a resolution approved recently by the House of Delegates of the American Bar Association that declared, "*Resolved*, That the American Bar Association endorses, as one of the primary war and peace objectives of the United Nations, agreement among such nations for the complete establishment and maintenance at the earliest possible moment of an effective international order among all nations *based on law and the orderly administration of justice.*"

ALBERT J. HARNO

Urbana, Illinois, May, 1943

# POST-WAR PLANNING AND THE AMERICAN BAR ASSOCIATION

By CHARLES M. LYMAN
Of the Connecticut Bar

NEVER has the American Bar Association had a greater opportunity combined with a heavier responsibility than it now faces with respect to post-war planning. The opportunity will be one for leadership in a vital concern of the Bar and of the nation; the responsibility will be that of speaking and acting deliberately and wisely or not at all. The best intellects of the world will be engaged in solving the gigantic problem, so that the Association must avoid any solution which is hasty, didactic, intolerant, or anything but the best that our best brains can produce. The responsibility for offering nothing which we cannot proudly compare with the suggestions of others everywhere, will fall primarily on the members of the House of Delegates, who will have the final word in August on anything which may be proposed up to that time. It is the personal responsibility of each individual member to be thoroughly prepared.

Perhaps it is necessary first to dispose of the assertions made in the past that the promulgation of a world constitution is a political question, not within the constitution of the Association itself. This disregards the difference between political questions in the sense of matters dealing with politics and political questions in the sense of those dealing with political science. With the first of these, we have nothing to do; with the second we have always been vitally concerned, deeply responsible, and actively engaged.

An active interest in post-war governmental planning is not only justified but commanded by more than one of our avowed objects. Criticism based on the limitation of them to the United States can be quickly laid out of the picture. Any world government which could be imagined would directly affect our country. If a world court is to control in certain aspects the doings of our own government, the interest of "the public throughout the United States" will be just as much concerned as is the public of any state in the federal constitution and the doings of the United States Supreme Court.

Similarly, the administration of justice under a world court will vitally affect the administration of justice in the United States, whose citizens will often be directly engaged in litigation before such a tribunal. But a system of such administration is itself dependent upon a sound pattern of government. It would be idle to sit back and say that we must wait until the government is erected before we take an active part in forming the justice department. The two are inseparably intertwined.

Again, we are to "uphold the honor of the profession of the law." Now, lawyers are exceptionally qualified to understand and to profit by experience, especially in governmental matters. Their whole background is a study of human experience. They cannot advise their clients on their problems without knowing what has been done in the past with similar questions. Can the Association keep its faith with the public if it refuses to give the benefit of its experience in a matter of such paramount importance? Will it uphold the honor of the profession if the organized Bar denies the public the benefit of its specialized experience?

We seek to "advance the science of jurisprudence." Surely an advance in the methods of administering justice to a worldwide extent is within this field. We can be of no assistance in guaranteeing an adequate international court if we do not also take part in formulating the fundamental law which gives it its life and being.

Finally, we cannot "correlate the activities" of the state and local associations "in the interest of the public throughout the United States" if we refuse to take part in activities in which many, if not all, of them will undoubtedly be engaged for some time to come.

The basis of experience ought to be the starting point from which lawyers are to judge the plans for the future. In selecting the experiences which may guide us in solving our post-war problems, there is a strong temptation to discard ancient ones. References, however, to the progress of the times and the immense change in conditions will have only specious weight. It is with psychology that we must deal first before going on to details of procedure and organization for world cooperation, if we are going to produce an effective international order. We cannot persuade other nations to unite with us in the interests of world peace and prosperity if we do not do as we do in ordinary life when we wish to persuade another and understand the workings of his mind, the probable reaction to us, the probable superiority of one method of approach over another. Are we to go to him and tell him we have a cut and dried proposition which he is to take or

leave? Or are we to negotiate with him until we reach a common basis of understanding for our best mutual benefit? The same principles must apply to nations. Is "cooperation" to be the acceptance of what some one nation says ought to be done, or does it extend to an open, unbiased, give-and-take discussion of means and methods of working toward the maximum good of all?

Human psychology has varied little over the centuries, so that psychological experience a century and a half old is as important as that which dates back only a quarter-century or less. The tremendous advances of science and education in a relatively short period of time have not changed this. The outrages of the bully are resented no less today than they were when George Washington was a boy, whether the bully and the bullied are individuals or nations. Suspicion of the many by the few, of the rich by the poor, is as strong in the shadow of modern industrial plants, airplanes, and locomotives as it was when Eli Whitney was pioneering in manufacturing, and horses were essential to travel. The complexity of our tax and economic structure has certainly not lessened the psychological reaction of the taxpayer to the tax gatherer. The ease and celerity of transcontinental travel have not made Delaware more anxious to yield to dictation from New York or California than it was when a hundred miles was a long day's journey.

The United States has had two outstanding experiences in the bringing together of independent sovereignties. One dates from 1787, the other from 1919. In studying these past events in order to throw light upon the most advisable future course, it must be borne in mind that the question which must be answered before any other can even be propounded is: how can the independent sovereignties be persuaded to meet together by their representativs, for *any* purpose of common and cooperative study and action? If they cannot be so persuaded, the alternatives are: small combinations of two or a few nations (which manifestly do not constitute an effective international order), universal isolationism (which is not international action at all), or dictation by the strong to the weak. It is not sufficient answer to the primary question to provide the mechanics for bringing representatives of the nations physically together. A way must be found to bring them together so that they will come with a determination to devise means for an effective international order if such means can possibly be found.

Let us consider the lesson of 1787. Thirteen independent states had united in their struggle against their common enemy. After their efforts had proved successful in 1783, they went their separate ways, knowing, however, that they must eventually reach some common ground as a measure of protection against future onslaughts of foreign powers and against quarrels among themselves. They were then bound together only by their community of interest and by the Articles of Confederation, which were so loose and powerless as to constitute no effective government at all. For four years they were learning by experience the defects in their system of isolationism. It was only after they had had an opportunity to learn the disadvantages of separate existence and the matters as to which a central government was essential, and after the excitement and emotionalism of a long war had had a chance to settle into a calm deliberation, that they called together a convention to decide how far they could go with a union.

The delegates who met in Philadelphia did not go with prepared plans in their pockets. No state had sent men there with a blueprint all laid out for submission to the others. They simply knew what the trouble was and what in general outline was the desirable result to be achieved. They then subdivided into committees to draft the different parts of the whole. They had their moments when agreement seemed impossible, of course. But they succeeded in giving and taking until the end in view was achieved and the rights of all were protected. The success of what they constructed, *starting from nothing*, is a matter of history.

Contrast the situation then with the events of 1919. Within a very few months after the close of the war, while bitterness, emotion, and hatred were still at a high point, the Peace Conference gathered. The problems were increased manyfold in complexity over those of 1787, yet there was no adequate period of study of what was either needed or practicable. The deliberations were had almost exclusively by representatives of powerful nations. A plan for universal international cooperation was developed without a chance for those to be governed to offer suggestions as to the effect upon the smaller countries. And the plan came to the Conference already laid out in detail by the representative of the country which probably was the most powerful one of all. It was a matter of approving or revising as to details a ready-made design, and not a cooperative study of the needs of the world. That their work was a failure is again a matter of history.

It cannot reasonably be argued that the background of circumstances played no part in bringing success to the one and failure to the other. The world today is faced with a selection of one of these methods or the other. The American Bar Association has started the machinery to travel the road leading to the method of 1919; but it is not too late to change its course, for it still has an opportunity to act wisely, thoughtfully, and deliberately when reports are presented in August pursuant to the resolutions of March directing a section committee to report definite plans at the annual meeting.

In order to understand the essential difference between these two methods of approach, let us suppose that New York had sent Alexander Hamilton to Philadelphia in 1787 with a carefully prepared plan in

detail for a general government. What would have happened? The probabilities are that the other delegates would then have turned their attention to a critical analysis of the scheme with the result that the product would have been less good than that which could be reached by a cooperative labor of construction from the bottom up. Every lawyer knows from his experience how this operates. He knows that when another lawyer submits for approval a contract already drawn, he himself will do a job of criticism and that far better results would have been reached had the two first sat down together and decided what ought to be covered by the instrument. If the submitting attorney happens to be a lawyer of high standing, representing powerful interests, the contribution of the other will be even less, for he either will suffer from the effects of an inferiority complex or will be overawed by the power behind the other man.

Of probably greater importance is that the effect on the less powerful states would have been to produce a feeling of futility. If New York already knew what it wanted and had taken the trouble to have its best brains put it into black and white, but colored with the particular interests of that state, of what use was it to fight for material changes? The union could not succeed without New York's wealth, power, and population, and if New York did not get substantially what she had decided in advance was the right thing she would probably withdraw. The consent of smaller states to join the union under such circumstances would probably have produced a combination no more enduring than the League of Nations. The only possible basis of a lasting union of states is one of whole-hearted volition.

The situation will be the same as that thus imagined if any powerful nation, without whose acquiescence no plan can succeed, comes to the peace table with anything like a blueprint prepared in advance. The smaller nations will feel that there is nothing left for them but to consent to the plan, as a gesture toward simple self-preservation. The other large nations will either have a plan of their own and produce open conflict and possible disruption of the conference or devote their attention to critical rather than constructive effort. A world-union, in order to endure, must have the enthusiastic approval of all its members. All of them must have an equal chance, from the very start, to have a hand in constructing the edifice.

This is not to say that no planning can be done in advance. It is only to say that anything savoring of a prescription must be avoided. Just as the delegates in 1787 knew in advance that certain things must be covered—a sufficiently but not excessively strong central government, the control of interstate commerce, an army and navy, a taxing power, a system for the administration of justice—and that certain other things must be avoided—such as the creation of a peerage, or undue domination by the larger states—so can we plan in advance as to the things to be considered essential in principle and the things to be avoided. But we must not warp our viewpoint by laying them down in fixed phrases or definite demands, thus producing a pride of creation and a pre-conceived notion which will make us blind to some superior idea advanced by other conferees.

Before we can derive any benefit from planning of this sort, however, there must be planned the mechanics for assembling an international convention. The original thirteen states did not first plan what the convention was going to produce before they adopted a means of calling the convention together. The place, the time, the method of representation, and many other details must be arranged. No element can be hastily devised and ill-considered. All nations must be made to believe that the meeting will be one for the exchange of ideas, in an honest endeavor to produce a workable union. The American Bar Association can be a leader, if it will, in guiding the nation to such a beneficent result and in frowning upon any tendency toward American dictation to other nations.

The report which, by its consideration, will bring these matters before the House of Delegates for discussion and action, is due at the annual meeting in August and will command the most serious deliberation by the House of Delegates. Proper action, enhancing the prestige of the Association and avoiding the pitfalls of haste and lack of study, will test the quality of the delegates as it has not before been tested. As always at the meetings of the House—unavoidably with such crowded calendars—there will be great strain and a heavy tax upon powers of concentration for the men who have to sit for hour after hour, listening to debate and giving serious thought to varied matters, some of great interest, others of little or no interest, to them. There will be temptations to impatience, arising out of uneven quality of presentation, sometimes repetitious and disproportionately long, with overemphasis upon minor details. There will often be undue emotional stress, insinuated into debates where emotion ought never to have ascendance over calm, intellectual, and deliberate balancing of arguments. There will be the necessity of overcoming great fatigue of mind by the will to do a good job. Self-instruction and study will be needed in advance of the meeting. But all these obstacles can be surmounted. Let it be to the eternal glory of the American Bar Association and its House of Delegates that they served their country well by surmounting them in the difficult days to come.

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# LEGAL ASSISTANCE TO MILITARY PERSONNEL

## *A Resume of the Services Contributed by Lawyers to Persons in the Armed Forces and Their Families*

By EDMUND RUFFIN BECKWITH*

Of the New York Bar

THE Armed Forces of the United States create for the legal profession of the country a problem which has three major aspects and a number of collateral ones.

The problem may also be said to have two parts which differ in point of time, but this is in general an unimportant difference. Considered as a whole, the problem is that men and women called away to military duty from their civilian occupations may have at the moment of departure unsettled questions or continuing contracts or unfinished duties of a legal nature which they cannot abandon and must resolve; and also that after they have departed from their homes such questions may arise, either out of the military service itself or out of the status they have left behind them, which equally demand a proper settlement.

Until about one year before the onset of the present war no general plan or method of procedure was available to the personnel in military service for the satisfactory disposal of their legal affairs except by the individual employment of lawyers, and great numbers of people were unfamiliar with such employment. It is a matter for general congratulation, and particularly one of pride on the part of the Bar, that since September, 1940, nearly the whole problem has been solved and the few outstanding details are on the way to a solution.

### The Three-Sided Problem

The first of the three major aspects of the problem concerns the man or woman before leaving home, which in general means while awaiting induction with certain knowledge that it is near, or it concerns some member of the family remaining at home after the departure. In a "check-list" of topics descriptive of the questions which may come up under these conditions (an account of which in some detail will be found below) there are 26 different headings, such as bank deposits, insurance policies, guardianship or other responsibility for children's affairs, leases, business interests, mortgages and so on.

The second aspect concerns the person in Service after he or she has arrived at camp or post or station, within the country or abroad, on land or sea; and this may be a case affecting either the person or the family (except, of course, cases of Military Discipline which are entirely outside the scope of this article).

The third aspect will be mentioned further on, because the way in which it is treated results directly from the methods used in the first two situations.

### The War Work Structure of the Bar

Beginning in September, 1940, the American Bar Association set up a Committee on National Defense which has continued actively ever since, changing its name to the Committee on War Work as soon after Pearl Harbor as the Association could act. At the time first mentioned four state bar associations had already set up Defense Committees, and the American Bar Association's committee began at once to urge all the others to do so, recommending a uniform plan of organization which would cover the whole country. This was accomplished early in 1941 so that forty-eight state committees and one in the District of Columbia were then at work, and meanwhile nearly one hundred bar associations in the larger cities had also joined in the nation-wide plan of organization.

There are about 179,000 lawyers in the United States. This number includes the judges, other public officials who have been admitted to the bar, and many men whose whole time is preoccupied with their employment in a "legal department" of some business concern, so that there may be perhaps 150,000 actively engaged in private practice. The American Bar Association is a voluntary body with about 30,000 members so that it has about one member in every five lawyers and this ratio holds good, on the average, in every state.

The membership of the state bar associations is not uniform. In a number of states the law requires every lawyer to become and remain a member of his state association. In the others, where the organization is a

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voluntary one, the ratio may be one in two or somewhat less. On the other hand almost all lawyers, except in the largest cities, belong to their local (county or city) associations.

As a general proposition it is approximately the fact that the more public-spirited lawyers belong to all three, their local and state and the American associations; while there are a few here and there who belong to none and take no regular part in the public work of their profession.

When the campaign to set up uniformly organized Committees on National Defense (War Work) was initiated by the American Bar Association's committee, it recommended that each state association call upon the strong local ones to name members for their own localities and then cover the state with selections from the ablest men available.

### Military Legal Aid

The first great job undertaken by all these committees together, again using a uniform plan set up by the American Bar Association's committee, was to take charge of and handle—free of all fees or other charges except cash-out-of-pocket expenses—the legal problems of Service personnel and their families. As soon as this program had been agreed upon, and some 1400-odd committeemen had been designated to manage it, the next step was to devise a method by which a legal question could be taken in hand and if necessary forwarded to the place where action was required. This was promptly done, and it has now been the case for well over two years that the legal affairs of Service personnel are handled successfully anywhere in the country.

The American Bar Association obtained an office in Washington for its committee and employed a staff. It compiled lists of all the state committees, and of all the legal aid societies (the permanent organizations for giving legal services to people in need, of which a great number have grown up in the past 60 years). Arrangements were made with the Army and Navy, the Red Cross, and from time to time with a variety of local centers of information, to keep copies of the lists on file, and to expedite in other ways the job of forwarding any case that might need such treatment.

Meanwhile, the Selective Service Law provided that for every local draft board there should be an "advisory board for registrants," and in most states these boards were composed almost wholly of lawyers. As the bar associations' system of committees grew steadily across the country the local committees kept in touch with the local advisory boards, and the state committee had its regular contact with the State Headquarters of Selective Service. The results would seem to be miraculous if they were not so logical. The explanation is simply that the plan was intensely practical and the lawyers who gave their services to the committees gave the very best that was in them.

Three kinds of things happened, not once but tens of thousands of times. First, a registrant or a person about to volunteer would consult a local advisory board or committeeman and the legal problem would be attended to on the spot. Second, after entering one of the Services the man or woman would become aware of an unsettled matter. Either, then, a letter would be written back home, or an interview would be arranged with a committeeman near the camp or station and he would write if he found it necessary. Third, a member of the family would write the Department under which the absent one was serving, or would address a letter to the President, or would act in any other way that would get the question started in some practicable channel. Sooner or later that letter would reach a point where a copy of the bar association list was on file, and immediately the system would take hold. It is the fact that such letters have come from persons on duty on the farthest fronts, and from members of their families in remote places, in the great cities and from "all over," thousands and thousands of them.

This system took care of both aspects of the general problem which have been so far mentioned, down to a certain time; but then it began to be inadequate for a reason which was inherent in the nature of military training in this great country, namely that very many camps and posts are located at considerable distances from the cities. There are not many lawyers in the country districts even in normal times, and in due course many thousands of lawyers went off to the war like other citizens. It became necessary to separate the problem into its two parts and to make a new provision for the millions of people in the camps and overseas, and so it has worked out since March, 1943, that the "second major aspect" mentioned above has been cared for in a new way.

### The Army's Cooperation with the Bar

The date, March 16 of this year, is an important one for the legal profession and for the public at large. Under that date the War Department issued its "Circular No. 74," relating to "Legal Assistance Offices," and for the first time in the history of the country a great cooperative plan came into being by which the Army undertakes with the volunteer bar association committees under the general guidance of the American Bar Association to provide for the legal needs of all military personnel. The Navy also is working along substantially similar lines. A few words will suffice to explain the procedure.

Circular No. 74 begins by saying that "The War Department and the American Bar Association have agreed to sponsor jointly the following plan to make adequate legal advice and assistance available throughout the Military Establishment to military personnel in the conduct of their personal affairs." It provides that the Commanding General of each Service Command (and the commanding officer of each post, camp and station within the continental United States, as well as in over-

seas commands where advisable) shall establish a "legal assistance office" with one or more commissioned officers and other personnel, to advise and assist persons in the Service directly and in cooperation with civilian lawyers through the Committee on War Work of the state in which the Command is located. Provision is made for convenient location of the office, and for notice to all persons concerned that this gratuitous service is available to them. The Office of The Judge Advocate General of the Army (the chief law officer) will supervise this work and coordinate it throughout the country.

This new development does not dispense with the bar association committees, but on the contrary it accentuates the special parts of the work which they and the legal aid societies will continue to do. They will now more than ever be able to attend to matters which require attention in court, the matters back home which no agency at a great distance away—not even the Army—would ever be able to dispose of. The civilian organizations of the Bar will continue to stand ready to serve the Armed Forces in every county-town and every other seat of the courts throughout the country, and they will be given a plenty to do until the demobilization of the emergency Forces is completed.

It is understood that the Navy Department will formalize its general conformance with this system by the issuance of a General Order in due course.

By these measures it has been assured that even in a great camp where thousands of the military personnel are gathered in a place remote from civilian facilities, and where the number of civilian lawyers is far too small for the purpose, as well as overseas where no civilians are available, the legal question or cause of worry and distraction will be promptly and skillfully attended to.

### Technical Materials Provided

Coincident with these organizational actions the bar associations have been busy writing and publishing appropriate manuals and technical papers for the correct guidance of their members, and the Services have published pamphlets having comparable purposes. The maintenance of the committees, the traveling, postage and other expenses have been principally borne by the associations out of the dues paid by their members, some printing has been done for them at public expense, and no charge has been laid upon the personnel for whom the work has been performed.

For example, the "check-list" referred to above was compiled through the joint efforts of the American Bar Association's committee and the War Committee of the Bar of the City of New York, after consultation with the representatives of banking, insurance and other nationally organized groups. It attempts to list every typical matter which ought to be disposed of before a person goes into uniform. Several state committees have printed material of this kind.

It is fair to say that these methods and technical materials have solved the whole problem as it relates to the individual case. There remains the "third aspect," which is now beginning to develop and which involves not so much the disposition of one affair but the prevention of situations out of which numerous cases might develop to give trouble.

For example, it recently occurred that a business company acted toward the mother of a soldier, with regard to a debt he had left unpaid, in a manner which seemed to be offensive and unfair. If no organization had existed to deal with such cases it might have passed unnoticed. It was reported to a legal assistance officer, who asked a committee member for advice. The next step was a conference with the trade association to which the business company belonged, and the creation of a policy within the trade by which such instances will in the future be handled internally and largely prevented from occurring. The same sort of procedure is being developed with other trade associations, the patriotic spirit of the citizens at large is being given a definite channel in which its efforts can be made productive of peaceable and just solutions in such matters, and the load of individual cases requiring attention should be correspondingly diminished.

### The Public and the Bar

The relationship between the public and the organized Bar, everywhere in the country, is easily understood and highly important. When an individual confronts a problem involving a legal question he or she expects to obtain the services of a skilled and trustworthy member of the Bar who thereupon becomes "my lawyer." When a great public need for legal services arises, in which the public plays the part of the client, it is not the individual lawyer but it is the whole legal profession which responds, with all its skill and its ingrained loyalty to the country's institutions. For that reason it has come to be said that "The Organized Bar Is the Public's Lawyer." In many different ways this ideal of public service works out to a desirable public and national result. The workings of it are not always easy to see. Like all large-scale activities this one is sometimes obscured so that, unless one takes time to examine it carefully, it may seem to be like the old story, that one "cannot see the forest for the trees." But certainly it is true that in this matter of giving professional assistance to the men and women who are fighting the good fight for liberty and for the American way of life the Bar is performing an honorable and useful service.

# OUR FLAG

By GEORGE R. FARNUM
of Boston
Former Assistant Attorney General of the United States

"AND for your country, boy, and for that flag, never dream a dream but of serving her as she bids you, though the service carry you through a thousand hells. No matter what happens to you, no matter who flatters you or who abuses you, never look at another flag, never let a night pass but you pray God to bless that flag. Remember, boy, that behind all these men you have to do with, behind officers, and government, and people even, there is the Country Herself, and that you belong to Her as you belong to your own mother." Thus spoke Philip Nolan, the tragic hero of Edward Everett Hale's *The Man Without a Country*. These stirring words echo down the years with renewed significance for those who man the fighting lines as well as for those who maintain the home front of our embattled nation in these critical days.

One hundred sixty-six years have elapsed since the Continental Congress formally resolved "That the flag of the United States be 13 stripes, alternate red and white; that the Union be 13 stars, white in a blue field representing a new constellation." In the dramatic and fateful years which have since passed, the 3,000,000 who inhabited the original colonies have expanded into 130,000,000 recruited from every country and representing every race, and occupying a great continent and many an insular outpost. The "new constellation" has increased to 48 stars. These tremendous changes which time has wrought have not come about without fierce struggles, sustained effort, readiness to meet every danger and willingness to make every sacrifice, and a high purpose and steadfast faith.

Our flag is a poignant reminder of this heroic past and of those sturdy and intrepid generations of free men who settled a remote continent, planted their enlightened institutions deep in its virgin soil, "brought forth" in the fullness of time "a new nation conceived in liberty, and dedicated to the proposition that all men are created equal," guided its phenomenal growth in size and power through every vicissitude and sedulously guarded those great principles of life for which it stood. It is also an admonition of our duty to protect the priceless heritage in these days of world revolution and national peril, and to pass it on unimpaired to those who will follow us.

Our flag is a symbol of the vital fact that the survival of ideals in this world is conditioned by the law of struggle. It came into being within a year of that electrifying Declaration which announced our independence and proclaimed those transcendent truths which were held to be self-evident. It was unfurled to the breeze midway in 1777—a year that opened triumphantly with Washington's victory at Princeton on the heels of his audacious exploit at Trenton, was to witness his discomfiture at Brandywine and Germantown, to see the British occupancy of Philadelphia, the then Capital city, and was to close with the Continental forces in their tragic winter quarters at Valley Forge. However, in the North at Saratoga, it was to mark a compensating event in the surrender of Burgoyne.

From then on to Yorktown, and from there down years packed with high adventure and the moving drama of the struggles of a people for the strength and power which come from unity and the blessings which flow from free institutions, the flag was carried forward on land and on sea.

There were times when the working of destiny seemed menacing and obscure, and the great goal elusive and remote. These were epochs of disorder when passion threatened to overrule reason and cupidity to dominate the better and truer instincts of the people. There were days of the disillusionment which is bred of blunders and defeats. But through it all—the perils of war and of internal convulsions, and the moral dangers of unprecedented industrial expansion and prosperity—the flag was borne onward by a people whose faith in a high ideal of a society, built on freedom, justice and truth, never failed in the end.

In that forward march to establish and maintain a great plan of life conceived by a free people, strong and inspired leaders were not lacking in the recurrent crises of the journey. The flag is a symbol of their devotion to the principles of popular government, their loyalty to high ideals of citizenship, their confidence in the capacity of the common people to govern themselves, and their faith in the sustaining and guiding power of Providence.

On the morning of September 13, 1814, a powerful British fleet arrived at Baltimore and ranged itself off Fort McHenry which, at the extremity of a peninsula, dominated the southern approaches to the city from the Patapsco river. Maneuvering into position, it opened an intense bombardment on the fort which lasted through the day and part of the night. On a nearby American

Note—The series of biographies of eminent soldier-lawyers written by Mr. Farnum for the JOURNAL will be resumed in the next issue.

ship, protected by a flag of truce, was a Washington lawyer, Francis Scott Key, brother-in-law of Roger B. Taney, then Secretary of the Treasury and destined to become Marshall's successor as Chief Justice of the United States. Key watched the night bombardment from the deck of his ship. Without means of communication, he remained in acute anxiety as to whether the cessation of firing was due to the fall of the fort, until "the dawn's early light" revealed that the flag over the bastion "was still there."

In the excitement of the moment, on the back of a letter which he was carrying in his pocket, he wrote some notes which he afterwards perfected and which were put to the music of an old Scotch song. One hundred seventeen years later, in 1931, the Star Spangled Banner became, by an act of Congress, our national anthem. Today that banner is firmly planted on the breastworks of embattled democracy, and when the dawn has come we shall look with confident expectation to see it waving triumphantly and unsullied in the morning breeze of a new day.

In this critical period in our history and in these testing and purging days in the life of our people, let us recall with deep emotion those words of Calvin Coolidge in a proclamation made when he was Governor of Massachusetts, "Alone of all flags it expresses the sovereignty of the people which endures when all else passes away. Speaking with their voice it has the sanctity of revelation. He who lives under it and is loyal to it is loyal to truth and justice everywhere. He who lives under it and is disloyal to it is a traitor to the human race everywhere. What could be saved if the flag of the American Nation were to perish?"

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# SENTENCING BY JUDGE OR PAROLE BOARD

By CHARLES C. ARADO
Of the Chicago Bar

WITH an indeterminate sentence applied to major offenses in nearly all states and the tendency definitely in the direction of "one year to life," parole boards exercise great power in the administration of criminal law. Few people assail the system in principle. Their attacks are against particular parole boards for specific instances of misconduct of duty. Upon the basis of these evils, a movement is afoot to transfer the balance of power to judges hearing the case. A minimum sentence of five years would bar the parole board from considering supervisory release until this period had run. It is argued that the judge's high responsibility as an elected official fits him for this task better than a group of appointed job-holders. This argument assumes that the judge is not in politics and that parole board members are unfaithful and incompetent. Disregarding these assumptions, the better judge of appropriate punishment is he who is steeped in knowledge of behaviorism and criminology.

The time element favors the parole board. They have the benefit of a prison diagnostic report supported by the prisoner's record during confinement. A judge, on the other hand, must guess the effect of conviction and the rigors of penal discipline which follow.

Another disadvantage of the judge is his emotional reaction to fresh facts. Judges vary in temperament. Details of the commission of the offense impress them differently. Such an intangible item as personality will influence the defendant's sentence. The primary purpose is not to punish, but to reconstruct the offender. How many judges have that divine sparkle to enable them to predict the effect of confinement upon personality and the future date when the accused will cease to be a menace to society?

The indeterminate sentence itself is a recognition of the difficulty presented in fixing appropriate punishment for criminal offenders. The prevailing movement flies into the face of recognized principles of criminology. It deviates from the path of reason into a quagmire of emotionalism. Justice calls for a continuing study of the prisoner during confinement. This data is essential for an intelligent disposition of the case. Perhaps the supreme court of each state should designate the personnel performing such delicate tasks. Only when an approach to the ultimate decision is made after the heat of the original hearing has subsided, after scientific information is at hand concerning the effect of confinement, can society claim that it is applying sound principles to this grave problem. Its immediate object at this moment is to stay on the right track.

### *Civilian Defense Manual*

The Office of Civilian Defense has made available to the Association a supply of the recently published *Civilian Defense Manual on Legal Aspects of Civilian Protection,* which was prepared by the Association's Committee on Civilian Defense.

Members may obtain upon request this 240 page authoritative and timely reference volume from Headquarters Office by sending 15c to cover the cost of handling and mailing.

# CHICAGO MEETING

## TENTATIVE SCHEDULE—AUGUST 23 - 26, 1943

### *Saturday, August 21*

**Morning**

Committee on Unauthorized Practice of the Law
Council of the Junior Bar Conference

**Afternoon**

Committee on Unauthorized Practice of the Law
Council of the Junior Bar Conference

### *Sunday, August 22*

**Morning**

Council of the Section of Insurance Law
Council of the Section of Taxation

**Afternoon**

Junior Bar Conference (General Session)
Council of the Section of Insurance Law
Council of the Section of Taxation

### *Monday, August 23*

**Morning**

First Assembly session

**Luncheons**

Section of Patent, Trade-Mark and Copyright Law
Council of the Section of Real Property, Probate and Trust Law

**Afternoon**

Joint Session—Section of Judicial Administration, Special Committee on Improving the Administration of Justice, and National Conference of Judicial Councils
Section meetings:
- Criminal Law
- Insurance Law (General Session)
- International and Comparative Law
- Patent, Trade-Mark and Copyright Law
- Public Utility Law
- Real Property, Probate and Trust Law

First session of the House of Delegates

**Dinner**

Joint Dinner—Section of Criminal Law, Section of Judicial Administration, Special Committee on Improving the Administration of Justice, and National Conference of Judicial Councils

### *Tuesday, August 24*

**Morning**

Section meetings:
- Bar Activities
- Commercial Law
- Criminal Law and Judicial Administration
- Insurance Law Round Tables:
  - Automobile Insurance Law
  - Fire Insurance Law
  - Health and Accident Insurance Law
  - Workmen's Compensation
  - Fidelity and Surety Law
- Legal Education and Admissions to the Bar, and National Conference of Bar Examiners
- Junior Bar Conference
- Mineral Law
- Municipal Law
- Patent, Trade-Mark and Copyright Law
- Public Utility Law
- Real Property, Probate and Trust Law (Divisional Meetings)
- Taxation

**Luncheons**

American Association for Protection of Industrial Property
Commercial Law and Taxation
International and Comparative Law, and Municipal Law

**Afternoon**

Section meetings:
- Commercial Law
- Criminal Law and Judicial Administration
- Insurance Law Round Tables:
  - Marine Law
  - Aviation Insurance Law
  - Casualty Insurance Law
  - Insurance Law Practice and Procedure
  - Life Insurance Law
- International and Comparative Law
- Legal Education and Admissions to the Bar, and National Conference of Bar Examiners
- Mineral Law
- Municipal Law
- Patent, Trade-Mark and Copyright Law
- Public Utility Law
- Real Property, Probate and Trust Law
- Taxation

**Section Dinners**

Insurance Law
Junior Bar Conference
Patent, Trade-Mark and Copyright Law

### *Wednesday, August 25*

**Morning**

Second Assembly Session

**Afternoon**

Second Session of the House of Delegates
Section of Criminal Law
Section of Insurance Law (General Session)
Taxation Section

**Evening**

Third Assembly Session
President's Reception

### *Thursday, August 26*

**Morning**

Fourth Assembly Session

**Afternoon**

Final Session of the House of Delegates
Final Assembly Session

**Evening**

Annual Dinner of the Association
Adjournment

# *Proposed Amendments*

## To the Constitution and By-Laws of the American Bar Association

**To be presented and acted upon at its sixty-sixth annual meeting at Chicago, Illinois, August 23-26, 1943**

*To the Members of the American Bar Association and of the House of Delegates:*

I.

NOTICE is hereby given that W. Leslie Miller of Detroit, Michigan, and Sidney Teiser of Portland, Oregon, members of the Association, have filed with the Secretary of the Association the following amendment to the Constitution of the Association:

Amend Article IX, Section 1, of the Constitution by striking out the words "Commercial Law" in line 12 thereof, and inserting in lieu thereof the words "Corporation, Banking and Mercantile Law," so that said line will read: "Section of Corporation, Banking and Mercantile Law."

II.

Notice is hereby given that Benjamin Wham, of Chicago, Illinois, member of the Association, has filed with the Secretary of the Association the following amendment to the By-Laws of the Association:

Amend Article I, Section 4 of the By-Laws by striking out the words "written notice to the Treasurer and" in line 5 thereof; by inserting in line 6 the word "fiscal" between the words "each" and "year"; by striking out in lines 6 and 7 the words "from July first to June thirtieth following, payable on July first of each year in advance"; and by striking out in lines 12, 13 and 14 thereof the words "upon written notice to the Treasurer before July first of any year, and shall thereafter pay only the regular dues as provided by Article II, Section 1" and substituting in lieu thereof the words, "by payment only of the regular dues as provided by Article II, Section 1,"

so that Article I, Section 4 of the By-Laws will then read:

"Section 4. *Sustaining Membership.* Any person eligible for membership in the Association and elected as above provided, and any member of the Association heretofore elected, may become a sustaining member of the Association upon payment of the sum of $25.00 dues for each fiscal year, which sum shall include the regular Association dues and the individual subscription of the member to the

*(Continued on page 416)*

# CHICAGO MEETING

*August 23-26, 1943*

The Sixty-Sixth Annual Meeting of the American Bar Association will be held at Chicago, Illinois, August 23 to 26, 1943. Further information with respect to the meeting will be given in the August issue of the JOURNAL.

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### Hotel Accommodations

Headquarters—The Drake Hotel

Hotel accommodations, all with private bath, are available, as follows:

| | Single for 1 person | Double (Dbl. bed) 2 persons | Twin-beds for 2 persons | Two-room suites (Parlor and 1 bedroom) |
|---|---|---|---|---|
| AMBASSADOR (State at Goethe) | $5.50 & $6.60 | $7.70–$8.80 | $7.70–$8.80 | $13.20–$16.50 |
| BLACKSTONE (Michigan & 6th St., So.) | 5.50 – 8.50 | | | |
| DRAKE.... (Advance reservations have now exhausted all space at Headquarters Hotel.) | | | | |
| EDGEWATER BEACH .... (5300 Sheridan Road) | 5.50 | 7.70 | 7.70 | 16.50 |
| KNICKER-BOCKER .... (163 E. Walton) | | 6.00 | 6.00–7.00 | 12.00–15.00 |
| MARYLAND . (900 Rush St.) | 3.00 | 4.50 | 5.00 | |
| MEDINAH CLUB .... (505 N. Michigan) | 4.00 | | 6.00–7.00 | 8.00–10.00 |
| SHERMAN .... (Randoph at Clark) | | | 7.70–11.00 | |

### Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one person.* A double room contains a double bed to be occupied by *two persons.*

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservation, stating hotel, **first and second choice,** number of rooms required and rate therefor, names of persons who will occupy the same, arrival date and, if possible, definite information as to whether such arrival will be in the morning or evening.

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Requests for reservations should be addressed to the Reservation Department, 1140 N. Dearborn Street, Chicago, Illinois.

# "THE MEMPHIS RESOLUTION"

THE Chicago Bar Association's Resolution concerning the "Agreement between the American Bar Association and the National Association of Real Estate Boards" (referred to as the "Memphis Resolution"), commented upon in the June 1943 issue of the AMERICAN BAR ASSOCIATION JOURNAL (Volume 29, pages 357-8), disapproves the "Memphis Resolution" and recommends that the American Bar Association rescind its approval thereof. The Illinois State Bar Association adopted a resolution identical with that of the Chicago Bar Association.

Omitting the preliminary paragraphs, the resolution adopted by the Illinois State and the Chicago Bar Associations is in part as follows:

The said "Memphis Resolution" is objectionable for the following reasons:

1. In Illinois it is solely the function of the courts to determine what constitutes the practice of law. [Citing five Illinois Cases.]

2. Paragraphs 1 and 2 of Article I of the "Memphis Resolution" are as follows: . . .

"(2) The realtor shall not undertake to draw or prepare documents fixing and defining the legal rights of parties to a transaction. However, when acting as broker, a realtor may use an earnest money contract form for the protection of either party against unreasonable withdrawal from the transaction, provided that such earnest money contract form, as well as any other standard legal forms used by the broker in transacting such business, shall first have been approved and promulgated for such use by the bar association and the real estate board in the locality where the forms are to be used."

. . . The first sentence in paragraph 2 above quoted states correctly a specific application of this rule. But the remainder of said paragraph 2 cannot be reconciled with the legal restrictions upon the unauthorized practice of law clearly set forth in the preceding language.

It has been suggested that a bar association might approve the principles of the "Memphis Resolution" and then by refusing to "approve and promulgate forms for such use" prevent the use of forms by realtors as contemplated by such resolution. A bar association could not in good faith follow such a course.

Paragraph 2 of Article I is objectionable, therefore, because:

(a) It is inconsistent with the rule stated in the preceding paragraph 1.

(b) It expressly permits the use by the realtor of an earnest money contract form to bind the principals to the transaction, which would require the exercise of legal skill and would constitute the practice of law.

(c) It purports to sanction the use by the broker of "any other standard legal forms used by the broker in transacting such business . . ."

3. Paragraph 2 of Article I is also objectionable because it contemplates the approval by state and local bar associations of legal forms for general use by real estate brokers. A bar association should not approve forms for such use because:

(a) The selection and filling in of forms in many instances requires the exercise of legal skill and thus constitutes the practice of law. By approving forms for use by real estate brokers, the bar association would thus be sanctioning the unauthorized practice of law. . . .

(b) It is practically impossible to prepare forms to meet the varying facts and conditions in the numerous transactions which arise. An indeterminate number of forms would be required. The selection and adaptation of the proper form for a particular transaction would present important legal problems. Legal documents should be drawn to express the intentions of the parties rather than to form a mold into which the intentions of the parties must either be fitted, with resulting distortion, or remain unexpressed.

(c) Many legal forms now available may be satisfactory when intelligently used. The mere stamp of approval of a form by a bar association cannot protect the public from improper selection or adaptation of the form by a layman . . .

4. (As to provisions in Paragraph 3 of Article I and Paragraph 2 of Article II of the "Memphis Resolution," it is stated):

The making of an agreement between realtors and lawyers which attempts to bind the realtor not "in any way to seek to influence the lawyer's compensation in real estate transactions in which the lawyer is consulted as legal counsel" and also attempts to bind the lawyer not "in any way to seek to influence the realtor's compensation in transactions in which the lawyer is consulted as legal counsel, *or otherwise*" violates a sound public policy. While such an agreement would appear to work to the pecuniary advantage of realtors and lawyers, it is clear that general compliance therewith by realtors and lawyers would be inimical to the public interest.

5. (Paragraphs 1 and 2 of Article II of the "Memphis Resolution" are quoted and commented upon as follows):

A strict compliance with the above quoted paragraphs might result in a violation of a lawyer's duty to his client. A lawyer should not be restricted in giving his client the benefit of any knowledge he may have bearing upon a transaction, whether it be on the question of business prudence, or the amount of a broker's compensation, or otherwise.

[Objections are made to other features which are contained in Paragraph 3 of Article II and Paragraphs 3 and 4 of Article III of the "Memphis Resolution" in the resolution of the Chicago and Illinois State Bar Associations, Paragraphs 6, 7 and 8, which on account of lack of space cannot be published in this issue. The complete text may be secured from the Chicago Bar Association.]

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## Federal Rules of Criminal Procedure

THE Supreme Court of the United States is closely following, in the broadened scope of the rule-making power entrusted to that Court by the Congress, the course which met with such marked approval in the Federal Rules of Civil Procedure.

It is understood that the Court has authorized the committee to give to its tentative draft of the proposed rules of criminal procedure, the same nation-wide distribution given to the civil rules, so that the profession and the bar organizations, national, state and local, may be given full opportunity to be heard.

Committees will undoubtedly be appointed by substantially all bar associations to examine and report on the proposed rules. Discussion will involve subjects of grave importance and there will be sharp controversies, out of which, however, there may emerge substantial aid to the solution of important problems.

Arthur T. Vanderbilt, chairman of the committee appointed by the Court to draft and submit to the Court for its consideration rules of procedure for the prosecution of criminal offenses, has at the request of the JOURNAL furnished for the information of the Bench and Bar an account of the committee's work. It appears in this number and will be read with interest, not only by the judges of the district courts and those who participate in the prosecution or defense of those charged with the breach of federal criminal statutes, but also by those who do not practice in the criminal courts, but who appreciate how important, to the administration of justice and to the preservation of the safety of the citizen and the public peace and order, is the impartial constant enforcement of the law, as well as adequate safeguards against injustice to innocent persons.

It is well worth recalling at this time, that originally all procedure to be followed in all the courts of justice, both in England and in this country from the beginning of its existence, was prescribed by the judicial department. Congress has wisely authorized the return to judicial responsibility of control of the methods to be employed in the conduct of judicial business. We are now well along to a happy return to the original idea, thanks to the cooperation of the legislative and judicial branches of our government.

It is perhaps well here to emphasize that the exercise of the rule-making power is confined to the control of methods of procedure to be employed in the courts and does not extend to laws which define crimes and fix the punishment to be inflicted on offenders, to the end that lawless acts may be prevented.

The task of the Advisory Committee on Rules for Criminal Procedure is in many respects more difficult than that undertaken by the committee on the rules of civil procedure. That committee's chief problems were to devise a single procedure applicable to actions at law and cases in equity and to provide for an escape from the consequences of the unfortunate experiment which compelled the federal courts to conform their methods "as nearly as may be" to state procedure. In the latter task the committee and the Court found aid in the fact that, in the Field codes and by the method of trial and error progress had been made towards simplicity and uniformity. However, in addition to the opposition which always arises against change until its necessity has been clearly manifested, change in criminal procedure awakens fear that the proposed changes may deprive one accused of criminal offenses, of life or liberty. Debate is thus affected by more emotional stress than is likely to be provoked by changes in the methods employed in the trial of civil actions.

One is not likely to be far wrong in hazarding the guess that difficulties and differences of opinion arose in the work of the Committee on Rules for Criminal Procedure. In such a field differences of opinion are not only to be expected, but to be welcomed, and the fact that the committee has agreed in the presentation to the Court of a draft of rules for criminal procedure is in itself a cause for congratulation and commendation.

It would not be surprising if similar differences of opinion should be strongly manifested among those to whom the rules are now submitted for criticism and constructive suggestions.

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## Renegotiation of Contracts for War Material

LAWYERS and clients have lately had difficulty in orienting to familiar concepts of contract law the new processes and standards for renegotiating contracts

made for the manufacture and delivery of the munitions of modern war. Both as to statutory provisions and applicable scope, as well as in respect of the factors to be taken into account in renegotiation, the whole subject may be still at a formative stage. It is a field in which clients depend heavily on their lawyers, and the lawyer's trained sense of fair play and reasoned adjustment become factors of great utility.

This month the JOURNAL gives the background of contract renegotiation and the nature of the problems which arise in these new tasks of the profession. The author is Lieutenant Colonel J. Harry LaBrum, of the Pennsylvania Bar, who has served on many committees of the American Bar Association. His narrative does not deal with the intricacies and uncertainties of this baffling administrative venture, but it will be found readable and informative, by at least those lawyers who have not yet had occasion to grapple with specialized problems in this field.

The whole subject is closely related to such problems as the revenues to be realized from corporate taxes, the form of prudent provisions for the wholesale termination and adjustment of war production contracts when the war ends, and the ability of private "industry" then to "get going" promptly to meet the need for jobs and fulfill the world's demand for peace-time goods. With lawyers as its active aids, the driving force of American private enterprise has done a magnificent job in converting and expanding the manufacturing capacity of plants for full-scale production of the munitions of war and lately in readapting those facilities to make their output keep pace with the fast-changing picture of the war's tempo and requirements. One question is as to whether or not the Government will in such matters as contract renegotiation and termination, leave American manufacturers in a robust position to do an equally outstanding job in changing back to full-gaited production in peace-time. There is, for example, an insistent demand for a protective statutory mandate that any renegotiation of contracts once negotiated between the Government and the producer and undergoing performance shall make allowance for the substantial expense to which contractors will be put in the rehabilitation and reconversion of their plants for post-war production.

There will be general approval among lawyers if there is official confirmation of the reported statements of the chairman of the Naval Price Adjustment Board that counsel for the Navy Department has advised that court review is available to contractors in the event of adverse determination in the course of renegotiations.

All these are issues of great novelty, complexity, and importance. They will have far-reaching impacts on lawyers and their post-war law business, as well as on the solvency and success of their clients. Colonel LaBrum's article steers clear of controversy, but it does put some of these issues specifically before the profession and the public, for consideration.

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### Military Justice

MAJOR General Cramer, The Judge Advocate General, recently discussed before the National Conference of Judicial Councils at Philadelphia the methods of trial procedure in courts martial and compared that procedure with the methods of criminal trials in the several states. He has consented to the publication of his address in this issue. He traces the history of military law and discusses the various changes which have been made in a code which originally was harsh and severe. Its development in this country has shown successive relaxation of its severity.

Many of us will remember the work of President Page and Stephen S. Gregory, the former chairman of a committee on changes in the law of courts martial during the first World War. The military code in force at the opening of World War II showed careful consideration of the questions which were thus presented during the period of World War I, and the result of that study demonstrates the contribution which the Bar had made to the subject and the receptive attitude of the Judge Advocate General's Department to those suggestions.

During one of the debates on the question of court martial procedure during the first World War, Provost Marshal General Enoch Crowder summed up his reply to some of the proposals made for a closer assimilation of procedure in the criminal courts of the various states and the courts martial. He said in substance that courts martial dealt with the offenses of soldiers; that obedience to orders was of vital importance in military operations; that military law had as one of its prime purposes the maintenance of discipline; that an army lacking in discipline was likely to be defeated by an army in which discipline was at a high stage.

There is evidence that these two conflicting ideas have been gradually approaching the solution of the questions involved. Today we seem to have reached a position where willful disobedience of orders and willful commission of military crimes are sternly punished, while extenuating circumstances accompanied by the lack of willful intent receive due consideration in mitigation of guilt.

With millions of our youths in military service, it is a source of gratification to those of us who must remain at home, to be assured by General Cramer that in the enforcement of military law justice and mercy each have their part.

# REVIEW OF RECENT SUPREME COURT DECISIONS

By EDGAR BRONSON TOLMAN*

### Eminent Domain—Just Compensation Contingent on Speculative Elements of Future Value

**The United States, acting for the Tennessee Valley Authority, sought to take for public use, land on which there is a power plant, and on which there are available other sites for additional power plants which might be united either by conveyance or through the exercise of the right of eminent domain under a state grant of power. The owner of the existing power plant and his other power plant sites claimed that the value of his land would be enhanced by the acquisition of the other available water power sites and their united operation. He claimed the ownership of all the stock of a corporation vested with the power of eminent domain by a state statute. Held that property sought to be taken for public use by the United States cannot be appraised on the hypothesis that the owner will be able to effect a union of his water power with power plants owned by others by condemnation under a state statute since such statutes are repealable and the hypothesis too speculative.**

*United States ex rel. TVA* v. *Powelson et al.*, 87 L. ed. Adv. Ops. 976; 63 Sup. Ct. Rep. 1047; U. S. Law Week 4379. (No. 3, decided May 17, 1943.)

One Powelson acquired land in North Carolina on the Hiwassee River, a tributary of the Tennessee. It was transferred by Powelson to Southern States Power Company, a North Carolina corporation, and by its wholly owned subsidiary, the Union Power Company, a Georgia corporation. Powelson is the sole stockholder of the Southern States Power Company.

On January 28, 1936, a declaration of taking was filed by Tennessee Valley Authority to acquire for the extension of its system the land owned by the Powelson companies. At that time those companies owned a small hydroelectric generating plant on a tributary of the Hiwassee River known as the Murphy Plant. It supplied light and power to the town of Murphy, North Carolina, and owned about 22,000 acres of land including lands for dam sites. Powelson was an experienced hydroelectric engineer. He began as early as 1913 to explore, survey, and acquire lands for hydroelectric plants on these rivers and at sites within the proposed TVA condemnation. In the TVA proceeding against the property and interests of the Powelson projects and property, the Government contended that the property sought to be acquired was worth from $95,000 to $165,000. The Powelson interests sought to establish a value of $7,500,000. Powelson's valuation was based on the theory that his property could be united with numerous other tracts owned by strangers and could thus be utilized for the construction of an elaborate four-dam hydroelectric project. Only one of those four dams was to be located on the property condemned. The Commission found that the land condemned was suitable for use as the site of a hydroelectric power plant and that its greatest inherent value was $1,437,000, although its cost was only $277,821.56. The Commission awarded $253,000 in addition as severance damages.

Both parties sought review by the three-judge district court. That court reduced the value of the land condemned to $976,289 and the severance value to $211,000. Interest was added from the filing of the initial declaration of taking. The Court of Appeals excluded the items of severance and other items and with those reductions affirmed the judgment of the district court.

The decision of the Circuit Court of Appeals was reversed. The opinion of the Court was delivered by Mr. Justice DOUGLAS.

A preliminary question as to the scope of review by the Circuit Court of Appeals was first considered. The Act provided for the appointment of commissioners to examine into the value of the land sought to be condemned, to conduct hearings, receive evidence and take such steps as might be proper for the determination of the value of the land. They were required to report the value and make an award. Review of the commissioners' action is by a three-judge court which is given power to pass de novo upon the proceedings had before the commissioners, view the property, and take additional evidence, and the Act provided that the judges should file their own award fixing the value of the property regardless of the award previously made by the commissioners. An appeal is provided from the district court to the Circuit Court of Appeals which shall upon the hearing of the appeal dispose of the same upon the record without regard to the award or findings theretofore made by the commissioners or the district judges and thereafter fix the value of the property. The contention was that the Circuit Court of Appeals did not perform the functions which the Act placed upon it. That contention was rejected and on that point Mr. Justice DOUGLAS says:

> The purpose of § 25 was to free the Circuit Court of Appeals from the strictures commonly applicable to its review of disputed questions of fact. Under § 25 it does not sit as a "court of errors." . . . Its duty is to dispose of the matter "upon the record, without regard to the awards or findings theretofore made" and to fix the value. But it need not blind itself to the special advantages of the tribunals below in evaluating the evidence. A trial de novo with the fresh taking of evidence is not required. An independent revaluation of the property condemned is contemplated. And that requirement was met here.

Section 25 of the Act authorizes award covering "the value of the land sought to be condemned" and the opinion declares that "the storm center of this controversy is whether water power value may be included in respondent's award."

The Government had contended that although the Hiwassee at the points in question was non-navigable the flow of water at those places had such a direct and

*Assisted by JAMES L. HOMIRE.

immediate effect on the navigable portion of the river farther downstream as to give the United States the same plenary control over the navigable and non-navigable parts of the river. In relation to that contention Mr. Justice DOUGLAS says:

> We do not stop to consider that question. For if we assume, without deciding, that rights in the "flow" of a non-navigable stream created by local law are property for which the United States must pay compensation when it condemns the lands of the riparian owner, the water power value which respondent sought to establish cannot be allowed.

As to the rules governing the ascertainment of the value of this property Mr. Justice DOUGLAS says:

> The burden of establishing the value of the lands sought to be condemned was on respondent. . . . Respondent endeavored to carry that burden by introducing evidence that the property condemned had a fair market value of $7,500,000. As we have said, the theory was that the lands condemned, together with other property owned by respondent, could be united with several hundred other tracts owned by strangers and that a four-dam hydroelectric project could be constructed upon all those lands. As we have noted, only one of the four hypothetical dams was to be located on the lands condemned. That was at the Hiwassee dam site, which considered alone, was not contended to be profitable for power development. Although respondent owned or controlled some of the other lands necessary for the four-dam project, about half of them were in adverse hands. It was practically conceded that the acquisition of all the property necessary for the four-dam development could not, in all reasonable probability, be accomplished without resort to the power of eminent domain. It was insisted, however, that since that power had been conferred by North Carolina, the case should be viewed as if respondent owned every foot of land required for the hypothetical project.
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> An owner of lands sought to be condemned is entitled to their "market value fairly determined." . . . That value may reflect not only the use to which the property is presently devoted but also that use to which it may be readily converted. . . . In that connection the value may be determined in light of the special or higher use of the land when combined with other parcels; it need not be measured merely by the use to which the land is or can be put as a separate tract. . . . But in order for that special adaptability to be considered, there must be a reasonable probability of the lands in question being combined with other tracts for that purpose in the reasonably near future. . . . In absence of such a showing, the chance of their being united for that special use is regarded "as too remote and speculative to have any legitimate effect upon the valuation." . . .

Mr. Justice DOUGLAS reviews the evidence pro and con on this phase of the question of value and the evaluation of the land owner that the grant of the power of eminent domain to the State of North Carolina met the objection that there was a showing of a reasonable prospect of acquiring the lands necessary for the consummation of his plan. On this point Mr. Justice DOUGLAS says:

> The fact that the owner also has a power of eminent domain does not alter the situation. . . . The grant of the power of eminent domain is a mere revocable privilege for which a state cannot be required to make compensation. . . . A revocation of that privilege is but a recall of a part of its sovereign power for which no price may be exacted. North Carolina follows that view. . . . Accordingly it seems clear that if North Carolina rather than the United States were constructing this public project and condemning the identical lands for the purpose, respondent need not be compensated for the loss of an opportunity to develop a power project through utilization of the right to condemn. In case this was North Carolina's project respondent's chances of combining these numerous tracts into one ownership for a power project would be measured without reference to the power of eminent domain. The inclusion of eminent domain would be but an indirect method of making North Carolina pay for the destruction or impairment of the privilege.
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> This is a case of first impression. No precedent has been advanced which suggests that a *different* measure of compensation should be required where the United States rather than the state is the taker of the property for a public project. Nor has any reason been suggested why as a matter of principle or policy there should be a *different* measure of compensation in such a case. It has long been assumed that in other respects the national government was under "no greater limitation" by reason of the Fifth Amendment than were the states by virtue of the Fourteenth. . . . That view is implicit in condemnation cases where the amount of just compensation required by the Fifth Amendment is in issue. . . . We do not see why the protection given to "private property" under the Fifth Amendment imposes upon the United States a duty to provide a *higher* measure of compensation for these lands than would be imposed by the Fourteenth Amendment upon the state if it were the taker. Nor has any reason based on considerations of equity and fair dealing been advanced for justifying a *higher* measure of compensation in the instant case because the lands are being taken for a public project sponsored by the United States rather than by North Carolina. The warrant or authority for putting the United States at such a disadvantage is not apparent.
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> The law of eminent domain is fashioned out of the conflict between the people's interest in public projects and the principle of indemnity to the landowner. We recently stated in *United States* v. *Miller*, . . . that "Courts have had to adopt working rules in order to do substantial justice in eminent domain proceedings." Equity and fair dealing do not require the payment by the United States to the landowner of the amount of a valuation of his lands based on the existence of his privilege to use the power of eminent domain. It is "private property" which the Fifth Amendment declares shall not be taken for public use without just compensation. The power of eminent domain can hardly be said to fall in that category. It is not a personal privilege; it is a special authority impressed with a public character and to be utilized for a public end. An award based on the value of that privilege would be an appropriation of public authority to a wholly private end.
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> This public project, to be sure, has frustrated respondent's plan for the exploitation of its power of eminent domain. We may assume that that privilege was a thing of value and that this frustration of the plan means a loss to respondent. But our denial of compensation for that loss does not make this an exceptional case in the law of eminent domain.
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> It is suggested that this result would mean that in condemnation proceedings the United States need not pay

the value of the property at the time of the taking if the state where the property is located might destroy or diminish that value through an appropriate exercise of its police power. It is manifest that such is not the case. A state may of course destroy or diminish values by an assertion of its police power without the necessity of making compensation for the loss. . . . While such a change will not be presumed . . . the possibility or probability of such action, so far as it affects present values, is a proper subject for consideration in valuing property for purposes of a condemnation award. . . . We do not disturb those general principles. The United States no more than a state can be excused from paying just compensation measured by the value of the property at the time of the taking merely because it could destroy that value by appropriate legislation or regulation. But we have here a unique situation. The power of eminent domain which respondent seeks to have reflected in the valuation is largely unexercised and need not be reflected in the measure of compensation if the state which conferred the privilege were the taker of the lands. If these numerous tracts had already been united by respondent through the power of eminent domain into a power project, distinct problems would be posed. . . . Then the United States would be acquiring a business, not simply frustrating a promotional scheme. We merely hold that the United States, in absence of a specific statutory requirement, need not make compensation for the loss of a business opportunity based on the unexercised privilege to use the power of eminent domain where the state need not do so were it the sponsor of the public project and the taker of the lands. The constitutional obligation of the United States to make compensation does not extend so far.

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We hold only that profits, attributable to the enterprise which respondent hoped to launch, are inadmissible as evidence of the value of the lands which were taken. Respondent is, of course, entitled to the market value of the property fairly determined. And that value should be found in accordance with the established rules . . . —uninfluenced, so far as practicable, by the circumstance that he whose lands are condemned has the power of eminent domain. We do not reach the question much discussed at the bar and in the briefs whether evidence of the earnings of respondent's hypothetical four-dam project should have been excluded for the further reason that it was too speculative.

Mr. Justice JACKSON filed a dissenting opinion. The basis of the dissent is manifested by the first and last paragraphs of that opinion.

The CHIEF JUSTICE, Mr. Justice ROBERTS, Mr. Justice FRANKFURTER and I understand the Court to hold that property physically adaptable to power purposes, taken by the Federal Government for power purposes among others, is to be valued as worthless for power purposes as matter of law because its projected development might be defeated if the State should revoke the power of eminent domain admittedly possessed by the owner at the time of the taking. We think it denies proper effect to State law and policy in effect at the time of taking.

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We think the same rule should apply against as for the Government, and that the property in question was entitled to the benefits at the time being extended by State authority in the absence of evidence of probability that they would be abrogated or curtailed. We do not think that because the power of eminent domain may have been revocable by the State it follows as matter of law that it must be treated as nonexistent, and we dissent from a reversal based on such grounds.

The case was argued by Mr. William C. Fitts, general counsel TVA, for the United States and by Mr. George Lyle Jones and Mr. George H. Wright for Powelson et al.

### Administrative Procedure—The Federal Communications Act—Right to Intervene as a Party and Appeal

**The right granted by the Federal Communications Commission to a clear channel on a designated frequency entitles the holder of that right to intervene and be heard, as a party, in proceedings on the petition of another station to be permitted to broadcast over that channel, and to appeal from the decision of the Commission.**

*Federal Communications Comm.* v. *NBC*, 87 L. ed. Adv. Ops. 962; 63 Sup. Ct. Rep. 1035; U. S. Law Week 4385. (No. 585, decided May 17, 1943.)

At the time when this controversy arose, National Broadcasting Company was licensed to operate "a clear channel" station, KOA, at Denver on a frequency of 850 kilocycles.

Station WHDH of Boston had a license to operate daytime only on the same frequency.

WHDH applied to the Communications Commission for an increase in power and for operation unlimited in time.

The Commission's rules precluded the operation of a second station at night on KOA's frequency.

The application was set down for hearing; the National Broadcasting Company petitioned for leave to intervene; its petition was denied; it then moved to dismiss WHDH's application for failure to conform to the Commission's rule in regard to such hearings. That motion was denied. Finally the application came on to be heard, limited to determination of the nature, extent and effect of any interference which would result from a grant of the application particularly to KOA and other stations named.

A hearing was held in January, 1940, but NBC was not permitted to participate. In December of that year the commissioners (two dissenting) promulgated findings of facts and conclusions. All agreed that the regulations precluded a grant of WHDH's application. Three voted to modify the regulations and grant the application.

NBC then filed its second petition to intervene. That petition also was denied. Subsequently on its own motion the Commission permitted NBC to file briefs and present an oral argument as *amicus curiae*. In April, 1941, the Commission adopted a formal order, amending its rule and granting the WHDH application, two commissioners dissenting.

NBC filed a petition for rehearing. This was denied. It gave notice of an appeal to the Court of Appeals, District of Columbia. That court held that NBC had a right to be made a party and participate in the hearing, and revised the Commission's order and remanded the case for further proceedings.

The Communications Commission applied for certiorari; it was granted and the Supreme Court affirmed the decision of the circuit court.

Mr. Justice ROBERTS delivered the opinion of the Court. In the first subdivision of his opinion he says: "We are of opinion that respondent was entitled to be made a party." He quoted that portion of Section 312 (b) of the Communications Act of 1934 which provides:

> Any station license hereafter granted . . . may be modified by the Commission . . . , if in the judgment of the Commission such action will promote the public interest, convenience, and necessity . . . *Provided however*, That no such order of modification shall become final until the holder of such outstanding license . . . shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue.

He points to the Commission's own finding in this proceeding that there would be interference with KOA's broadcast in the eastern part of the United States if WHDH's application were granted, and its own report to Congress "that at night a small proportion of the urban population and a much larger proportion of the rural population of the country enjoy only such broadcasting service as is afforded by clear channel stations." The opinion emphasizes the admitted fact that KOA continuously since 1924 has used a clear channel upon which only one other station was permitted to operate during the night, and therefore under the Commission's regulations KOA had little or no channel interference from any station in the United States. In addition to these privileges, the international agreement with Canada, Mexico and Cuba made KOA's signals free and entitled to remain free from interference from any station in those countries.

Concluding this review of unchallenged facts, Mr. Justice ROBERTS says:

> The Commission's order deprives KOA of freedom from interference in its night service over a large area lying east of the Mississippi River. Furthermore, the order opens the way for Canada, Mexico, and Cuba, signatories to the broadcasting agreement, to acquire the right to operate stations which may cause channel interference at night on KOA's frequency within the United States.

The opinion proceeds to summarize the contentions of KOA and the Commission and quotes the Commission's rules in regard to a "clear channel" station and Mr. Justice ROBERTS says:

> These rules were incorporated into the terms of KOA's license which granted it a frequency of 850 kilocycles and a power of 50 kilowatts. To alter the rules so as to deprive KOA of what had been assigned to it, and to grant an application which would create interference on the channel given it, was in fact and in substance to modify KOA's license. This being so, § 312 (b) requires that it be made a party to the proceeding. We can accord no other meaning to the language of the proviso which requires that the holder of the license which is to be modified must have notice in writing of the proposed action and the grounds therefor and must be given a reasonable opportunity to show cause why an order of modification should not issue. Certainly one who is to be notified of a hearing and to have the right to show cause is not to be considered a stranger to the proceeding but is, by the very provisions of the statute, to be made a party. The very notices issued by the Commission show that that body knew there would probably be an interference with KOA's signals if the pending application of WHDH were granted; and that the Commission also realized there was a serious question whether the application could be granted under its existing rules. It is not necessary to discuss at any length the sufficiency of the petitions to intervene if, as we have held, the Act itself provided that, in such an instance as the present, KOA was entitled to be brought in as a party. A licensee cannot show cause unless it is afforded opportunity to participate in the hearing, to offer evidence, and to exercise the other rights of a party.

FCC raised for the first time in the Supreme Court a point of jurisdiction, based upon its interpretation of that part of the Communications Act concerning the right of appeal. On this point Mr. Justice ROBERTS says:

> It would be anomalous if one entitled to be heard before the Commission should be denied the right of appeal from an order made without hearing. We think the Act does not preclude such an appeal. Section 402 (b) (2) permits an appeal to the Court of Appeals of the District of Columbia by "any . . . person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing" any application for modification of an existing station license. If, within the intent of the statute, the interests of KOA would be adversely affected, or if KOA would be aggrieved by granting the application of WHDH, then the statute grants KOA a right of appeal.

After pointing out the analogies arising in an earlier decision of the Court, Mr. Justice ROBERTS closes his opinion as follows:

> In view of the fact that § 312 (b) grants KOA the right to become a party to the proceedings, we think it plain that it is a party aggrieved, or a party whose interests will be adversely affected by the grant of WHDH's application, as, indeed the Commission seems to have thought when it first noticed WHDH's application for hearing. We, therefore, hold KOA was entitled to appeal from the Commission's action in excluding it from participation in the proceeding and from the order made by the Commission.

Mr. Justice BLACK, Mr. Justice MURPHY and Mr. Justice RUTLEDGE took no part in the consideration or decision of this case.

Mr. Justice FRANKFURTER filed a dissenting opinion. The opening paragraph shows the fundamental reason for his dissent. He there says:

> Unlike courts, which are concerned primarily with the enforcement of private rights although public interests may thereby be implicated, administrative agencies are predominantly concerned with enforcing public rights although private interests may thereby be affected. To no small degree administrative agencies for the enforcement of public rights were established by Congress because more flexible and less traditional procedures were called for than those evolved by the courts. It is therefore essential to the vitality of the administrative process that the procedural powers given to these administrative agencies not be confined within the conventional modes by which business is done in courts.
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> In my judgment the decision of the Court in this case imposes a hampering restriction upon the functioning of the administrative process. This is the aspect that lends

this case importance and leads me to express the reasons for my dissent.

The dissenting opinion takes up the statutory provisions of the Communications Act as to procedure before the Commission, quotes the interpretation given to those provisions in the Attorney General's Committee on Administrative Procedure, follows in detail the various steps taken before the Commission and in the courts and declares:

> The record affords no basis, therefore, for finding that KOA had standing to appeal from the grant of the WHDH application. But even if it had, I do not believe that KOA was afforded less opportunity to participate in the proceedings before the Commission than the statute requires. Assuming that the grant of the WHDH application constituted a "modification" of KOA's license in the sense that the scope of the operations authorized by KOA's license was thereby limited, only § 312 (b) would come into operation. Section 303 (f) is inapplicable because the grant of the WHDH application unquestionably did not change KOA's frequency, power, or hours of operation. Both before and after the Commission's action, KOA's operating assignment was precisely the same: 850 kilocycles, 50 kilowatts, unlimited time. And so the only question on this phase of the case is—was KOA afforded such opportunity of participation in the WHDH proceeding as § 312 (b) requires? That section provides that no order modifying the license of any existing station "shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue."

Mr. Justice FRANKFURTER supports the Commission's contention that permission to file a brief and make an oral argument was a substantial compliance of the statutory rules and that the full rights of a party litigant were not required. The opinion on this point declares:

> To deny to the Commission the right to require a preliminary showing, such as was found wanting here, before admitting a petitioner to the full rights of a party litigant is to fasten upon the Commission's administrative process the technical requirements evolved by courts for the adjudication of controversies over private interests. See *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142-44. It is to assume that the modes familiar to courts for the protection of substantial interests are the only permissible modes, regardless of the nature of the subject matter and the tribunals charged with administration of the law. This is to read the discretion given to the Federal Communications Commission to fashion a procedure relevant to the interests for the adjustment of which the Commission was established through the distorting spectacles of what has been found appropriate for courts. We must assume that an agency which Congress has trusted is worthy of the trust. And especially when sitting in judgment upon procedure devised by the Commission for the fair protection of both public and private interests, we must view what the Commission has done with a generous and not a jealous eye.

Mr. Justice DOUGLAS also dissented. He declares himself to be in substantial agreement with Mr. Justice FRANKFURTER but emphasizes the view that KOA was not shown to be financially injured by the grant of the enlarged rights given to WHDH, that the questions involved were those concerning the public interest and that KOA had no standing to be admitted as a party in such a controversy.

The case was argued by Mr. Paul A. Freund for the FCC and by Mr. Philip J. Hennessey, Jr., for NBC.

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### Review of State Administrative Agencies and State Tribunals in the Federal Courts

**In the federal courts where diversity of citizenship jurisdiction exists and the action of a state Commission is challenged as denying due process of law "it is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy."**

*Burford et al. v. Sun Oil Company, et al.; Sun Oil Company et al. v. Burford et al.*, 87 L. ed. Adv. Ops. 999; 63 Sup. Ct. Rep. 1098; U. S. Law Week 4410. (Nos. 495 and 496, decided May 24, 1943.)

The Sun Oil Company and others brought an action in the federal district court attacking the validity of an order of the Texas Railroad Commission granting to one Burford a permit to drill four wells on a small tract of land in the East Texas oil field. Jurisdiction of the federal court was based on diversity of citizenship and on the company's contention that the order denied them due process of law.

The East Texas oil field, in which the Burford tract is located, is declared to be "one of the largest in the United States." It is said to contain over 26,000 wells in an area of about as many square miles. Oil exists "in the pores and crevices of rocks and sand" and moves through those channels. The East Texas field is a giant oil pool. Oil moves through this pool and is brought to the surface of the wells by pressure of gas and water and unless those pressures are maintained, the oil level will sink and the oil must be pumped at great and in many instances prohibitive expense. Because the oil moves through the entire field, one operator can not only draw the oil from under his own surface area, but can also, if advantageously located, draw oil from the most distant parts of the pool.

The primary question involved was whether the federal district court should, because of diversity of citizenship and the claim of constitutional right, exercise judicial power and interfere with the administration under state law of the complex and important control of this administrative problem which the State of Texas had undertaken to direct under the authority of Texas legislation. The district court dismissed the action, the circuit court of appeals reversed that judgment and the Supreme Court reversed the decision of the circuit court of appeals and affirmed the district court.

The opinion of the Court was delivered by Mr. Justice BLACK. On this question he says:

> Although a federal equity court does have jurisdiction of a particular proceeding, it may, in its sound discretion, whether its jurisdiction is invoked on the ground of diversity of citizenship or otherwise, "refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest"; for it "is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence

of state governments in carrying out their domestic policy." While many other questions are argued, we find it necessary to decide only one: Assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?

Mr. Justice BLACK emphasizes the necessity "based upon geological realities" that each oil and gas field must be regulated as a unit for conservation purposes. He declares that the federal government has chosen to leave the principal regulatory responsibility with the states and merely supplements that control. He emphasizes the point that while the state has unquestionable constitutional power to take appropriate action to protect the industry and public interests, it also attempts to control the flow of oil and thus to protect the interests of many operators who have from time to time "been entangled in geological-legal problems of novel nature." The controversy involved the validity of a state rule, No. 37. That rule provides for certain minimum spacing between wells, but also allows exceptions where necessary "to prevent waste or to prevent the confiscation of property." The prevention of confiscation is based upon the premises that "insofar as these privileges are compatible with the prevention of waste and the achievement of conservation, each surface owner should be permitted to withdraw the oil under his surface area, and that no one else can fairly be permitted to drain his oil away." The Commission, therefore, claims the right to protect the owner's interests either by adjusting the amount of production upward or by permitting him to drill additional wells, and the rule implies that "by this method each person will be entitled to recover a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land."

Of this solution of these complex problems, Mr. Justice BLACK says:

> The delusive simplicity with which these principles of exception to Rule 37 can be stated should not obscure the actual non-legal complexities involved in their application. While the surface holder may, subject to qualifications noted, be entitled under current Texas law to the oil under his land, there can be no absolute certainty as to how much oil actually is present, . . . and since the waste and confiscation problems are as a matter of physical necessity so closely interrelated, decision of one of the questions necessarily involves recognition of the other. The sheer quantity of exception cases makes their disposition of great public importance.

It is declared that "over two-thirds of the wells in the East Texas field exist as exceptions to the rule" and that "the instant case arises from just such an exception." Emphasizing the importance of the least possible interference with the action of the state authorities in this difficult administrative problem, Mr. Justice BLACK says:

> With full knowledge of the importance of the decisions of the Railroad Commission both to the state and to the oil operators, the Texas legislature has established a system of thorough judicial review by its own state courts. The Commission orders may be appealed to a state district court in Travis County, and are reviewed by a branch of the Court of Civil Appeals and by the State Supreme Court. While the constitutional power of the commission to enforce Rule 37 or to make exceptions to it is seldom seriously challenged, . . . the validity of particular orders from the standpoint of statutory interpretation may present a serious problem, and a substantial number of such cases have been disposed of by the Texas courts which alone have the power to give definite answers to the questions of state law posed in these proceedings.

Drawing analogies from former decisions which illustrate the steady course of the Court to escape the confusion arising from multiple reviews, Mr. Justice BLACK says:

> To prevent the confusion of multiple review of the same general issues, the legislature provided for concentration of all direct review of the Commission's orders in the state district courts of Travis County. The Texas courts have authoritatively declared the purpose of this restriction: "If an order of the commission, lawful on its face, can be collaterally attacked in the various courts and counties of the state on grounds such as those urged in the instant case, interminable confusion would result."
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> The very "confusion" which the Texas legislature and Supreme Court feared might result from review by many state courts of the Railroad Commission's orders has resulted from the exercise of federal equity jurisdiction. As a practical matter, the federal courts can make small contribution to the well organized system of regulation and review which the Texas statutes provide. Texas courts can give fully as great relief, including temporary restraining orders, as the federal courts. Delay, misunderstanding of local law, and needless federal conflict with the state policy, are the inevitable product of this double system of review. The most striking example of misunderstanding has come where the federal court has flatly disagreed with the position later taken by a state court as to state law.
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> These federal court decisions on state law have created a constant task for the Texas Governor, the Texas legislature, and the Railroad Commission. The Governor of Texas, as has been noted above, felt called upon to forge his oil program in the light of the remotest inferences of federal court opinions. In one instance he thought it necessary to declare martial law. Special sessions of the legislature have been occupied with consideration of federal court decisions. Legislation passed under the circumstances of the strain and doubt created by these decisions was necessarily unsatisfactory. The Railroad Commission has had to adjust itself to the permutations of the law as seen by the federal courts. The most recent example was in connection with the *Rowan and Nichols* case in which the Commission felt compelled to adopt a new proration scheme to comply with the demands of a federal court decision which was reversed when it came to this Court.

It is declared that the conflict between federal courts and Texas has lessened appreciably in recent years primarily as a result of the decisions in the *Rowan and Nichols* case, where the Supreme Court assumed that the principal issue in the review of Railroad Commission orders was "whether the Commission had confined itself within the boundaries of due process of law," and held that "any special relief provided by state statutes must be pursued in a state court." It was contended that under a decision of the Texas Supreme Court in one of the Sun Oil Company cases, the courts, whether federal or state, are required to review the Commission's order, not for constitutional validity, but for compliance with

"reasonableness" under the state statute. On this point Mr. Justice BLACK says:

> The whole cycle of federal-state conflict cannot be permitted to begin again by acceptance of this view. Insofar as we have discretion to do so, we should leave these problems of Texas law to the state court where each may be handled as "one more item in a continuous series of adjustments."
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> The state provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here. . . . Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand.
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> The decision of the circuit court of appeals is reversed and the judgment of the district court dismissing the complaint is affirmed for the reasons here stated.

Mr. Justice DOUGLAS filed a concurring opinion, in which Mr. Justice MURPHY joined. It opens as follows:

> I agree with the opinion of the Court and join in it. But there are observations in the dissenting opinion which impel me to add a few words. If the issues in this case were framed as the dissenting opinion frames them, I would agree that we should reach the merits and not direct a dismissal of the complaint. But the opinion of the Court as I read it does not hold or even fairly imply that "the enforcement of state rights created by state legislation and affecting state policies is limited to the state courts." Any such holding would result in a drastic inroad on diversity jurisdiction—a limitation which I agree might be desirable but which Congress, not this Court, should make. The holding in these cases, however, goes to no such length.

It reviews the much cited case, *Pennsylvania* v. *Williams*, and the Texas statute and concludes as follows:

> The opinion of the Court calls the Railroad Commission and the Texas courts "working partners." But as its review of Texas decisions shows, the courts may at times be the senior and dominant member of that partnership if they perform the functions which Texas law places on them. The courts do not sit merely to enforce rights based on orders of the state administrative agency. They sit in judgment on that agency. That to me is the crux of the matter. If the federal courts undertook to sit in review, so to speak, of this state administrative agency, they would in effect actively participate in the fashioning of the state's domestic policy. That interference would be a continuing one, as the opinion of the Court points out. Moreover, divided authority would result. Divided authority breeds friction—friction potentially more serious than would have obtained in *Pennsylvania* v. *Williams*, if the administration of the affairs of that insolvent corporation had been left in the federal court to the exclusion of the state administrative agency.

Mr. Justice FRANKFURTER filed a dissenting opinion. The opening paragraphs of his opinion indicate the point of view from which he regards the important problem here involved:

> To deny a suitor access to a federal district court under the circumstances of this case is to disregard a duty enjoined by Congress and made manifest by the whole history of the jurisdiction of the United States courts based upon diversity of citizenship between parties. For I am assuming that law declared by this Court, in contradistinction to law declared by Congress, is something other than the manipulation of words to formulate a predetermined result. Judicial law to me implies at least some continuity of intellectual criteria and procedures in dealing with recurring problems.
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> I believe it to be wholly accurate to say that throughout our history it has never been questioned that a right created by state law and enforceable in the state courts can also be enforced in the federal courts where the parties to the controversy are citizens of different states. The reasons which led Congress to grant such jurisdiction to the federal courts are familiar. It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become imbedded in a judgment of a state court and yet not be sufficiently apparent to be made the basis of a federal claim. To avoid possible discriminations of this sort, so the theory goes, a citizen of a state other than that in which he is suing or being sued ought to be able to go into a wholly impartial tribunal, namely, the federal court sitting in that state. Thus, the basic premise of federal jurisdiction based upon diversity of the parties' citizenship is that the federal courts should afford remedies which are coextensive with rights created by state law and enforceable in state courts.
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> That is the theory of diversity jurisdiction. Whether it is a sound theory, whether diversity jurisdiction is necessary or desirable in order to avoid possible unfairness by state courts, state judges and juries, against outsiders, whether the federal courts ought to be relieved of the burden of diversity litigation,—these are matters which are not my concern as a judge. They are the concern of those whose business it is to legislate, not mine. I speak as one who has long favored the entire abolition of diversity jurisdiction. But I must decide this case as a judge and not as a legislative reformer.

Mr. Justice FRANKFURTER then reviews a long series of cases which he places in the category of steps in the modification of or limitation on the diversity of citizenship jurisdiction and proceeds to an examination of the rights sought here to be enforced in the federal courts. On this point, Mr. Justice FRANKFURTER says:

> Let us examine briefly the nature of the rights sought here to be enforced in the federal courts. In 1919 the Texas Railroad Commission issued its Rule 37 imposing general spacing limitations upon the drilling of oil wells, "provided that the Commission in order to prevent waste or to prevent the confiscation of property" would grant exceptions from the general restrictions. The order of the Railroad Commission in this case granted a permit to drill a well in exception to Rule 37. Section 8 of Article 6049c to Vernon's Texas Civil Statutes, 1925, provides that any "interested person affected by . . . any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a court of competent jurisdiction in Travis County, Texas, and not elsewhere against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders."

Discussing the question of the interpretation of the Texas statute, Mr. Justice FRANKFURTER takes up two

possible views as to the standards by which the Court should be governed in reviewing the validity of Commission orders: (1) that the statute precludes reviews in the federal district court and confines it to state courts. That contention is rejected because of numerous decisions to the contrary and following the discussion of those cases, he says:

> Clearly, therefore, the scope of judicial review in a Rule 37 case, as declared by the Supreme Court of Texas, is precisely as well defined, for example, as the scope of judicial review by the federal courts of orders of the Interstate Commerce Commission or the National Labor Relations Board. That the scope of review may be different does not make the standards of review any less definite or less susceptible of application by a court. I think there can be no doubt that under the Constitution and laws of Texas, as construed by the decisions of the state courts, such courts exercise a judicial power in these cases precisely similar to that wielded by the federal courts under Article III. Can it be said, therefore, that in considering the validity of an exception allowed by the Texas Railroad Commission under Rule 37, the federal judges sitting in that state are engaged in duties which are foreign to their experience and abilities? Judges who sit in judgment upon the legality of orders made by the Interstate Commerce Commission are certainly not incompetent to apply the narrowly defined standards of law established by Texas for review of the orders of its Railroad Commission.

The next question taken up is whether Texas has manifested any desire to confine the review of the orders of the Railroad Commission to state courts sitting in Travis County. Here again the learned Justice reviews the history of this legislation and the cases which have construed the statute. He implies, although he does not declare, that it cannot fairly be said that the Texas legislature meant to exclude the federal courts from exercising jurisdiction in these cases. In what he regards the controlling question as to the review of the rules and orders of the Texas Commission, Mr. Justice FRANKFURTER says:

> And so, the case really reduces itself to this: in the actual application of the standards governing judicial review of Commission orders allowing exceptions under Rule 37—standards which today have been authoritatively and precisely defined—a different result may be obtained if suit is brought in the federal rather than the state courts.
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> It is the essence of diversity jurisdiction that federal judges and juries should pass on asserted claims because the result might be different if they were decided by a state court. There may be excellent reasons why Congress should abolish diversity jurisdiction. But, with all deference, it is not a defensible ground for having this Court by indirection abrogate diversity jurisdiction when, as a matter of fact, Congress has persistently refused to restrict such jurisdiction except in the limited area occupied by the Johnson Act. The Congressional premise of diversity jurisdiction is that the possibility of unfairness against outside litigants is to be avoided by providing the neutral forums of a federal court. The Court today is in effect withdrawing this grant of jurisdiction in order to avoid possible unfairness against state interests in the federal courts. That which Congress created to assure impartiality of adjudication is now destroyed to prevent what is deemed to be hostility and bias in adjudication.
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> Perhaps no judicial action calls for a more cautious exercise of discretion than the appointment of a receiver by a court of equity, especially where the enterprise to be administered relates to important public interests.

Mr. Justice FRANKFURTER refers to *Pennsylvania* v. *Williams*, the interpretation of which had been a matter of controversy in this case, and says:

> The *Williams* case, in other words, is but an application of the traditional doctrine that a court of equity should stay its hand from the improvident appointment of a receiver.

In referring to certain colloquialisms which had been brought into the discussion, Mr. Justice FRANKFURTER says:

> But the use of such colloquial expressions can hardly obliterate the distinction between judicial power and legislative power, whether the latter be exercised directly by the legislature or indirectly through its administrative agencies. The courts of Texas sit in judgment upon the Railroad Commission of Texas only in so far as they have been charged by Texas law with the duty of ascertaining the validity of Commission action. They no more "participate in the fashioning of the state's domestic policy" than the federal courts participate in the fashioning of the transportation policy of the federal government in reviewing orders of the Interstate Commerce Commission under the Urgent Deficiencies Act.

Mr. Justice FRANKFURTER ends his dissenting opinion with the following paragraph:

> The opinion of the Court cuts deep into our judicial fabric. The duty of the judiciary is to exercise the jurisdiction which Congress has conferred. What the Court is doing today I might wholeheartedly approve if it were done by Congress. But I cannot justify translation of the circumstances of my membership on this Court into an opportunity of writing my private view of legislative policy into law and thereby effacing a far greater area of diversity jurisdiction than Senator Norris, as chairman of the Senate Judiciary Committee, was ever able to persuade Congress itself to do.

Mr. Justice ROBERTS and Mr. Justice REED join in this dissent.

The CHIEF JUSTICE expresses no views as to the desirability, as a matter of legislative policy, of retaining the diversity jurisdiction. In all other respects he concurs in the opinion of Mr. Justice FRANKFURTER.

The case was argued by Mr. James P. Hart and Mr. Ed Roy Simmons for Burford; by Mr. J. B. Robertson for Magnolia Petroleum Company, and by Mr. J. A. Rauhut for Sun Oil Company.

*Hastings et al.* v. *Selby Oil & Gas Company et al.*, 87 L. ed. Adv. Ops. 1017; 63 Sup. Ct. Rep. 1114; U. S. Law Week 4418. (No. 528, decided May 24, 1943.)

This case came up on certiorari from the United States Circuit Court of Appeals. For the reasons set out in the foregoing opinion, the decision was reversed.

Mr. Justice BLACK delivered the opinion of the Court:

> This is an action in the nature of an equity proceeding brought by the respondents to cancel an order of the Texas Railroad Commission granting petitioners Hastings and Dodson a permit under Rule 37 of the Railroad

Commission to drill an oil well. The respondents contend that the order granting a permit to the petitioners deprives them of property without due process of law, and that the order is invalid as a matter of Texas law. Jurisdiction is rested on diversity of citizenship.

There are no significant differences between the problems presented here and those in *Burford* v. *Sun Oil Co.*, decided this day. For the reasons set forth in that opinion, the decision below is reversed and the cause is remanded with instructions to dismiss the complaint.

The CHIEF JUSTICE, Mr. Justice ROBERTS, Mr. Justice REED, and Mr. Justice FRANKFURTER dissent for the reasons stated by them in the dissenting opinion above referred to.

The case was argued by Mr. W. Edward Lee for Hastings, by Mr. James D. Smullen, Assistant Attorney General of Texas, for Railroad Commission of Texas, and by Mr. Dan Moody for Selby Oil & Gas Company.

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### Patents—Reissue Patents License Agreements—Declaratory Judgments, Applicability to Patent Cases

**The Declaratory Judgment Act is applicable to a "case or controversy" involving a justiciable issue in a patent case, raised either by the complaint or by a counterclaim.**

*Altvater et al.* v. *Freeman et al.*, 87 L. ed. Adv. Ops. 1035; 63 Sup. Ct. Rep. 1115; U. S. Law Week 4406. (No. 696, decided May 24, 1943.)

This was a case brought by respondents for specific performance of a patent license agreement under a reissue patent. The bill alleged that the defendants, contrary to the license contracts, were manufacturing and selling certain devices which infringed the reissue patent, and had not confined themselves to the territory in which the license agreement permitted them to make sales of the patented article. The bill asked for specific performance of the license agreement and an injunction and accounting. The petitioners (defendants below) answered, denying generally the allegations of the bill and setting up various defenses, among others that the reissued patents were invalid and that their rights still existed under the original patent. By way of counterclaim they alleged that the license agreement did not cover the reissued patents; that they were willing to pay royalties if the agreement covered the reissues and if they were valid; they accordingly alleged that to protect the business built up in good faith under the license, an adjudication of the controversy was necessary; they prayed that the reissue patents be declared invalid or, if valid, that the license agreement be extended to them.

The case came to the Supreme Court on petition for certiorari granted because of the apparent misinterpretation by the circuit court of appeals of a former decision of the Supreme Court in a related case.

The opinion of the Court was delivered by Mr. Justice DOUGLAS. He finds it necessary to summarize earlier litigation between the parties to this suit because of the light which that litigation throws on the present controversy. As to the instant case, Mr. Justice DOUGLAS says:

> That case was tried only on bill and answer. The district court adjudged a claim of a patent valid although it dismissed the bill for failure to prove infringement. We held that the finding of validity was immaterial to the disposition of the cause and that the winning party might appeal to obtain a reformation of the decree. To hold a patent valid if it is not infringed is to decide a hypothetical case. But the situation in the present case is quite different. We have here not only bill and answer but a counterclaim. Though the decision of non-infringement disposes of the bill and answer, it does not dispose of the counterclaim which raises the question of validity. *Sola Electric Co.* v. *Jefferson Electric Co.*, 318 U. S.—is authority for the proposition that the issue of validity may be raised by a counterclaim in an infringement suit. The requirements of case or controversy are of course no less strict under the Declaratory Judgment Act . . . than in case of other suits. . . . But we are of the view that the issues raised by the present counterclaim were justiciable and that the controversy between the parties did not come to an end . . . on the dismissal of the bill for non-infringement, since their dispute went beyond the single claim and the particular accused devices involved in that suit.

The plaintiff claimed that the payment of royalties by the defendants estopped them from raising the issue of invalidity. That contention the Court laid aside as not requiring examination or application here and it was said:

> In the present case both the district court and the circuit court of appeals have found that the license agreement was terminated on the surrender of the original patent and was not renewed and extended to cover the reissue patents. The fact that royalties were being paid did not make this a "difference or dispute of a hypothetical or abstract character." . . . A controversy was raging, even apart from the continued existence of the license agreement. That controversy was "definite and concrete, touching the legal relations of parties having adverse legal interests." . . . That controversy concerned the validity of the reissue patents. Those patents had many claims in addition to the single one involved in the issue of infringement. And petitioners were manufacturing and selling additional articles claimed to fall under the patents. Royalties were being demanded and royalties were being paid. But they were being paid under protest and under the compulsion of an injunction decree. It was to lift the heavy hand of that tribute from the business that the counterclaim was filed. Unless the injunction decree were modified, the only other course was to defy it, and to risk not only actual but treble damages in infringement suits. . . . It was the function of the Declaratory Judgment Act to afford relief against such peril and insecurity. . . . And certainly the requirements of case or controversy are met where payment of a claim is demanded as of right and where payment is made, but where the involuntary or coercive nature of the exaction preserves the right to recover the sums paid or to challenge the legality of the claim.

Mr. Justice DOUGLAS concludes his opinion as follows:

> Our conclusion is that it was error for the circuit court of appeals to have treated the issues raised by the counterclaim as moot. They were not moot; and the district court had passed on them. Accordingly, the circuit court of

appeals should have reviewed that adjudication. The judgment is reversed and the cause remanded to the circuit court of appeals for that purpose.

Mr. Justice FRANKFURTER filed a separate opinion in which the opening paragraph summarizes his views of the practical problems involved:

> We are concerned here with a problem in judicial administration, not a question in algebra as to which there is a demonstrably right or wrong answer. The case before us presents only one phase of an extensive, complicated patent litigation involving numerous technical and interdependent issues. The question which we must now decide is this—in view of the present posture of the controversy, shall one of these issues be adjudicated in the manner indicated by the circuit court of appeals, or shall this Court direct that it be adjudicated upon the defendants' counterclaim for a declaratory judgment? We are all agreed that while a district court may have jurisdiction of a suit or claim under the Federal Declaratory Judgments Act, 28 U. S. C. § 400, it is under no compulsion to exercise such jurisdiction. If another proceeding is pending in which the claim in controversy may be satisfactorily adjudicated, a declaratory judgment is not a mandatory remedy. Sound judicical administration requires, in my view, that we decline to interfere with the procedure which the court below has provided for the adjudication of the claims for which the defendants sought a declaratory judgment.

He declares that the litigation is "wrapt in confusion," but he proceeds to unravel that confusion and to restate the facts as he understands them to be in the light of the earlier litigation and the conduct of the parties in relation thereto. Speaking of the final action of the circuit court of appeals, Mr. Justice FRANKFURTER says:

> The circuit court of appeals has thus committed to the district court substantially the same questions as those raised by the defendants' counterclaim, *i. e.*, those relating to the validity of the reissue patents. By this action the circuit court of appeals had effectively recalled its previous ruling that these questions were "moot." Whatever might be said, therefore, as to the correctness of its ruling that the validity of the reissue patents presented "non-justiciable" questions, the inescapable fact remains that there is now before the district court for determination a proceeding initiated by the petitioners involving the very questions raised by the counterclaim.
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> Therefore, it seems to me that good judicial administration should stay our interference with the circuit court of appeals' exercise of its discretion in adjusting the manner by which the issues as to the validity of the reissue patents should be adjudicated. It is the circuit court of appeals which, by its action of April 15, 1943, has in effect remanded the cause to the district court for determination of these issues. No valid reason appears for disturbing the disposition it has made of the litigation. The lower federal courts ought not to be narrowly confined in determining whether a declaratory judgment is an appropriate remedy under all the circumstances.
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> If we are to consider the correctness of the ruling that the issues relating to the validity of the reissue patents are not "justiciable," I find it too difficult to accept the reasoning of my Brethren. The Court's conclusion that the circuit court of appeals erred in finding "mootness" as to the questions raised by the counterclaim rests substantially upon the notion that a controversy still exists because the defendants are laboring under the "heavy" obligation of paying royalties under the license agreement. But we have held that the controversy must be "definite and concrete," "real and substantial," in order that a declaratory judgment may be given.
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> Potential purchasers may naturally be reluctant to establish business relations upon so insecure a basis. But the Court has not chosen to sustain the propriety of a declaratory judgment here upon this ground, and it is therefore idle to consider its merits.

Mr. JUSTICE ROBERTS joins in this opinion.

The case was argued by Mr. Edmund C. Rogers and Mr. Lawrence C. Kingsland for petitioners, and by Mr. Marston Allen for respondents.

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### State Taxation—Louisiana Unemployment Compensation Law—Declaratory Judgment

**In the exercise of the traditional discretion with which courts of equity grant or deny extraordinary relief, the federal courts will not ordinarily restrain state officers from collecting state taxes where state law affords an adequate remedy to the taxpayer. This doctrine applies by analogy to the exercise or withholding of declaratory judgments.**

*Great Lakes Dredge & Dock Company et al.*, v. *Huffman, Adm.*, 87 L. ed. Adv. Ops. 1021; 63 Sup. Ct. Rep. 1070; U. S. Law Week 4418. (No. 849, decided May 24, 1943.)

The Great Lakes Dredge & Dock Company brought this action in a federal district court against Huffman, a state officer charged with the administration and enforcement of the Louisiana Unemployment Compensation Law. The complaint alleged that the Great Lakes Company have numerous classes of employees engaged in the navigation and operation of dredges and pile drivers and many other types of vessels, all used in deepening, dredging and otherwise improving channels for the navigation of the waters of the state, and that the tax or contribution imposed would exact from the plaintiffs sums of money in each case in excess of $3,000. The complaint prays for a declaratory judgment that the state law as applied to them and their employees is unconstitutional. After a trial the district court held the statute applicable to the company and their employees and a valid exercise of state power and ordered dismissal of the suit.

Because of the importance of the question to be decided, certiorari was granted and the case argued. The hearing was limited to a discussion of the question whether the declaratory judgment procedure can be appropriately used in the case where the complaint asks a judgment against a state officer to prevent enforcement of a state statute. The court below held that the act exacts of employers payments into the state unemployment insurance fund in the nature of an excise tax upon the exercise of the right and privilege of employing individuals and measured by a percentage of the wages paid. The company had challenged the state's right to collect a tax and had interposed as a barrier to its collection the present suit.

The district court had in substance given a declaratory judgment, which the circuit court of appeals had sustained. Save for that purpose, those courts had no occasion to entertain the suit or pronounce any judgment in it. Neither court nor any of the parties had questioned the sufficiency of the pleadings to present a case for declaratory judgment.

The Supreme Court affirmed the decision of the circuit court of appeals in an opinion delivered by the CHIEF JUSTICE, who, after stating the course of the case through the courts, the contentions of the respective parties, and defining the question involved, says:

> In answering it the nature of the remedy afforded to taxpayers by state law for the illegal exaction of the tax is of importance. Section 18 of Article 10 of the Constitution of Louisiana of 1921 directs that: "The Legislature shall provide against the issuance of process to restrain the collection of any tax and for a complete and adequate remedy for the prompt recovery by every taxpayer of any illegal tax paid by him." And Act 330 of 1938 sets up a complete statutory scheme to carry into effect the constitutional provision. By it the courts of the state are forbidden to restrain the collection of any state tax; and any person aggrieved and "resisting the payment of any amount found due, or the enforcement of any provision of such laws in relation thereto" shall pay the tax to the appropriate state officer and file suit for its recovery in either the state or federal courts. Pending the suit the amount collected is required to be segregated and held subject to any judgment rendered in the suit. If the taxpayer prevails in the suit, interest at two per cent per annum is added to the amount of taxes refunded.

The CHIEF JUSTICE refers to the cases in which the Supreme Court has recognized that the federal courts in the exercise of the sound discretion which has traditionally guided courts of equity in granting or withholding the extraordinary relief which they may afford, will not ordinarily restrain state officers from collecting the taxes "where state law affords an adequate remedy to the taxpayer." He points out that the withholding of extraordinary relief, by courts having authority to grant it, is not a denial of the jurisdiction which Congress has conferred on the federal courts or of the federal rule that the measure of inadequacy of a legal remedy is the legal remedy afforded by the federal not the state courts.

The CHIEF JUSTICE declares that:

> It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.

Reference is made to congressional recognition and approval of such a practice by the federal equity courts. The CHIEF JUSTICE makes application of these restraints and limitations in suits to enjoin the collection of taxes to the instant case in which, instead of an application for an injury, recourse was sought to the more recent form of remedy by declaratory judgment, and on this point the CHIEF JUSTICE says:

> The considerations which persuaded federal courts of equity not to grant relief against an allegedly unlawful state tax, and which led to the enactment of the Act of August 21, 1937, are persuasive that relief by way of declaratory judgment may likewise be withheld in the sound discretion of the court. With due regard for these considerations, it is the court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. In such a suit he may assert his federal rights and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes.

Applying the principle thus laid down to the present case, the CHIEF JUSTICE closes his opinion as follows:

> For like reasons, we think it plain also that the enactment of the Act of August 30, 1935 . . . which excluded from the operation of the Declaratory Judgments Act all cases involving federal taxes, cannot be taken to deprive the courts of their discretionary authority to withhold declaratory relief in other appropriate cases. This amendment was passed merely for the purpose of "making it clear" that the Declaratory Judgments Act would not permit "a radical departure from the long-continued policy of Congress" to require prompt payment of federal taxes. . . .
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> The judgment of dismissal below must therefore be affirmed, but solely on the ground that, in the appropriate exercise of the court's discretion, relief by way of a declaratory judgment should have been denied without consideration of the merits.

The case was argued by Mr. R. Emmett Kerrigan for the Dredging Company, and by Mr. W. C. Perrault for Huffman.

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### Constitutional Law — Seventh Amendment — Direction of Verdict in Jury Trials in Federal Courts

**In trials at law in the federal courts, the Seventh Amendment does not forbid the federal courts from directing verdicts or from setting verdicts aside for insufficiency of evidence. That amendment did not bind the federal courts to the exact procedural incidents or details of jury trials in force under the common law in 1791.**

*Joseph Galloway v. United States of America,* 87 L. ed. Adv. Ops. 1042; 63 Sup. Ct. Rep. 1077; U. S. Law Week 4395 (No. 553, decided May 24, 1943.)

In this case the Supreme Court reviews proceedings had upon a suit brought by a veteran of the World War of 1914-1918, through his wife as guardian. The action was brought upon a war risk insurance contract seeking benefits for total and permanent disability by reason of insanity of the veteran which is claimed existed May 31, 1919. On that day the policy lapsed for non-payment of premium. The federal trial court granted a motion for a directed verdict at the close of the evidence and judgment was entered accordingly. The circuit court of appeals affirmed. Both courts held the evidence legally insufficient to sustain a verdict for the veteran. Galloway contends that the direction of a verdict against him was erroneous and, in effect, deprived him of trial by jury, contrary to the Seventh Amendment.

On certiorari, the Supreme Court affirmed the ruling below in an opinion by Mr. Justice RUTLEDGE.

The opinion discusses in detail the evidence of record as to Galloway's insanity. While it was clearly established that total and permanent disability did occur sometime prior to 1938, the Court finds that there was insufficient evidence to sustain the burden of proof that there was any such total and permanent disability on May 31, 1919, when the policy lapsed.

The opinion then discusses the contention that the practice of directing a verdict as applied in this case offends the Seventh Amendment. In dealing with this contention it is first observed that the contention comes too late since it has been established for nearly a century that the Seventh Amendment did not deprive the federal courts of power to direct a verdict for insufficiency of evidence.

Turning then to the historical basis for the argument, Mr. Justice RUTLEDGE finds that it is not convincing in support of Galloway's contention. In this connection the opinion states:

> Furthermore, the argument from history is not convincing. It is not that "the rules of the common law" in 1791 deprived trial courts of power to withdraw cases from the jury, because not made out, or appellate courts of power to review such determinations. The jury was not absolute master of fact in 1791. Then as now courts excluded evidence for irrelevancy and relevant proof for other reasons. The argument concedes they weighed the evidence, not only piecemeal but *in toto* for submission to the jury, by at least two procedures, the demurrer to the evidence and the motion for a new trial. The objection is not therefore to the basic thing, which is the power of the court to withhold cases from the jury or set aside the verdict for insufficiency of the evidence. It is rather to incidental or collateral effects, namely, that the directed verdict as now administered differs from both those procedures because, on the one hand, allegedly higher standards of proof are required and, on the other, different consequences follow as to further maintenance of the litigation. Apart from the standards of proof, the argument appears to urge that in 1791, a litigant could challenge his opponent's evidence, either by the demurrer, which when determined ended the litigation, or by motion for a new trial which, if successful, gave the adversary another chance to prove his case; and therefore the Amendment excluded any challenge to which one or the other of these consequences does not attach.
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> The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing. Nor were "the rules of the common law" then prevalent, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystallized in a fixed and immutable system. On the contrary, they were constantly changing and developing during the late eighteenth and early nineteenth centuries. In 1791 this process already had resulted in widely divergent common-law rules on procedural matters among the states, and between them and England. And none of the contemporaneous rules regarding judicial control of the evidence going to juries or its sufficiency to support a verdict had reached any precise, much less final, form. In addition, the passage of time has obscured much of the procedure which then may have had more or less definite form, even for historical purposes.

Mr. Justice BLACK, delivered a dissenting opinion in which Mr. Justice DOUGLAS and Mr. Justice MURPHY concurred. In the dissent it is argued that the evidence was sufficient to go to the jury. Furthermore, the dissent urges that a verdict should be directed, if at all, only when without weighing the credibility of witnesses there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy. After a review of the historical evolution of judicial control over jurors, Mr. Justice BLACK states his conclusion in the following portion of his opinion.

> The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that Constitutional right preserved. Either the judge or the jury must decide facts and to the extent that we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights may be peculiarly difficult, for here it is our own power which we must restrain. We should not fail to meet the expectation of James Madison, who, in advocating the adoption of the Bill of Rights, said: "Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; . . . they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of right." So few of these cases come to this Court that, as a matter of fact, the judges of the district courts and the circuit courts of appeal are the primary custodians of the Amendment. As for myself, I believe that a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy. I shall continue to believe that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preservation of this constitutional right even though each case necessarily turns on its peculiar circumstances.

The case was argued by Mr. Warren E. Miller for Galloway and by Mr. Lester P. Schoene for the United States.

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### New York Unemployment Insurance Tax — Application to Employers of Marine Workers

**The validity of the New York Unemployment Insurance Tax is sustained against challenges that it violates Article 3, Section 2 of the Constitution conferring exclusive admiralty jurisdiction on the federal courts and that Congress has declared that no such tax shall be imposed on maritime employers.**

*Standard Dredging Corporation v. Murphy*, 87 L. ed. Adv. Ops. 1017; 63 Sup. Ct. Rep. 1067; U. S. Law Week 4409. (Nos. 722 and 723, decided May 24, 1943.)

In this opinion the Court considers a challenge, in two cases, to the validity of the New York Unemployment Insurance Tax which is levied as a payroll tax on all employers of four or more persons with certain exceptions not material to the case. The money collected is paid into a general fund for the benefit of all unemployed persons covered. The employee involved in one case was an assistant cook on a dredge, and in the other a grain worker on a floating elevator. Vessels on which they work were engaged primarily in waters

in the State of New York during the tax period. The employers attacked the statute on two grounds: (1) the imposition of the tax on maritime employees violates Article 3, § 2 of the Constitution which gives federal courts exclusive admiralty jurisdiction; and (2) Congress has expressly or impliedly declared that no such tax shall be imposed on maritime employers. The New York Court of Appeals rejected both contentions and on appeal its ruling was affirmed by the Supreme Court in an opinion by Mr. Justice BLACK.

In rejecting the first contention Mr. Justice BLACK says:

> That the state is vested with power to impose taxes in general upon employers to alleviate unemployment, and that the authority of the state is in no wise impaired by reason of blending the imposition of a tax with the relief of unemployment has already been decided by this Court. . . . In a series of cases, however, beginning with *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, this Court called attention to the necessity of uniformity in certain aspects of maritime law, and invalidated several state workmen's compensation acts as applied on the ground that their enforcement would interfere with that essential uniformity. We are now asked to apply the *Jensen* doctrine to the field of unemployment insurance and to invalidate the statute before us on the ground that it is destructive of admiralty uniformity. The effect on admiralty of an unemployment insurance program is so markedly different from the effect which it was feared might follow from workmen's compensation legislation that we find no reason to expand the *Jensen* doctrine into this new area. Indeed, the *Jensen* case has already been severely limited, and has no vitality beyond that which may continue as to state workmen's compensation laws. . . .
>
> Granting that the federal government might choose to operate its own uniform unemployment insurance system for maritime workers if it chose, "Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved." . . . When state compensation laws began to provide a remedy for maritime torts, it was at least arguable that the state remedy interfered with the existing admiralty system of relief through actions such as maintenance and cure. But in dealing with unemployment insurance "exclusive federal jurisdiction" is not affected at all. Congress retains the power to act in the field, and in the meantime, federal courts have nothing to do with it. No principle of admiralty requires uniformity of state taxation. Taxes on vessels and other business activities of operators have previously been upheld. We hold that nothing in Article 3, § 2 of the Constitution places this tax beyond the authority of the state.

The Court also rejected the second contention of the employers after discussing briefly the provisions of U S.C. § 1600-11 and § 1607.

The case was argued by Mr. Cletus Keating for the Dredging Company; by Mr. Robert B. Lisle for the Elevating Company, and by Mr. Orrin G. Judd for the Industrial Commissioner of New York.

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### Federal Employers Liability Act — Proof of Negligence on part of Employer — Direction of Verdict

**In an action under the Federal Employers Liability Act a verdict for the defendant should not be directed if the evidence is such that fair-minded men may reach different conclusions on the issue of the negligence of the railroad company. Under those circumstances the issue should be decided by the jury.**

*Bailey v. Central Vermont Railway, Inc.*, 87 L. ed. Adv. Ops. 1030; 63 Sup. Ct. Rep. 1062; U. S. Law Week 4404. (No. 640, decided May 24, 1943.)

In this case the Court reviews on certiorari a judgment of the Supreme Court of Vermont which ruled that the trial court, in a suit brought under the Federal Employers' Liability Act, should have directed a verdict for the railroad. The Supreme Court, in an opinion by Mr. Justice DOUGLAS, reverses the ruling of the state court holding, after a review of the evidence of record, that the case was one for the jury since fair-minded men might reach different conclusions on the question whether the railroad had furnished Bailey, the deceased employee, a safe place in which to do his work.

The importance of this case lies not so much in its contribution to the body of law construing the Federal Employers' Liability Act as it does in the view expressed by a minority of the Court that cases of this type were not intended by Congress to be reviewed by the Supreme Court of the United States.

In a separate opinion, Mr. Justice ROBERTS urges that this case is not one of that character. His opinion discusses the evolution of federal appellate review, the creation of the circuit courts of appeals, the abolition of appeal as of right in cases arising under the Federal Employers' Liability Act and related legislation and the substitution therefor of discretionary review, and finally the Congressional action of 1925 making review of all litigation from state and federal tribunals discretionary except for narrowly restricted classes.

In the light of these developments, Mr. Justice ROBERTS urges that cases of the character here involved should not be reviewed by the Supreme Court. In elaboration of his views on this question he says:

> Without the benefit of this restriction of its obligatory jurisdiction this Court could not have attained the end and aim of its creation. But there remains the constant danger that, by taking cases lying outside defined areas of importance, the Court will limit its ability adequately to deal with those which all will agree it must adjudicate.
>
> And so the policy of the Court has been to abstain from taking a case even though it thought it erroneously decided below, whether on an issue of law or fact, if the decision did not involve an important question of law, did not create a diversity of decision in lower courts, or would not seriously affect the administration of the law in other cases. And this has been especially so where a decision below recognized the controlling legal principles but was claimed to have applied them improperly to the specific facts disclosed. The instant case plainly belongs in the class last mentioned. All members of the Supreme Court of Vermont agreed upon the controlling legal rule. They sharply and almost evenly divided on the question whether the plaintiff's evidence brought her case within that rule. What they decided, and what we decide, can add nothing to the body of jurisprudence. And it is irrelevant to the question of our exercise of the power of review that if we had been charged with the responsibility of a trial judge or a member of the court below, we might have held the case one for submission to a jury.
>
> In almost every litigation the parties are afforded hearings in at least two courts. This was true here, the appellate

court being the supreme court of the state of the parties' residence. If, in such a case, we accord a third hearing, whenever we should have applied the law differently, we shall have little time or opportunity to do aught else than examine the claims of plaintiffs and defendants that, in the special circumstances disclosed, prejudicial errors have been committed in the admission of evidence, in rulings of law, and in charges to juries.

There is no reason why a preference should be given, in these respects, to actions instituted under the Federal Employers' Liability Act, over others founded on other federal statutes, over contract cases, or admiralty cases, where a failure properly to rule on the facts is asserted to have wrought injury to one of the parties.

Mr. Justice FRANKFURTER joined in the opinion of Mr. Justice ROBERTS.

The CHIEF JUSTICE expressed his agreement with Mr. Justice ROBERTS that the present case is not appropriate for the exercise of discretionary power to afford a second appellate review. He added, however, that the Court here has adhered to its practice of granting certiorari upon the affirmative vote of four justices, and consequently the case was properly before the Court, and that it is correctly decided.

The case was argued by Mr. Joseph A. McNamara for Bailey, and by Mr. Horace H. Powers for the Railroad.

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### State Taxation of Federal Instrumentalities

**A Florida statute provides for the inspection and labeling of commercial fertilizers sold or distributed in that state. The United States, through its Department of Agriculture, under the provisions of the Soil Conservation and Domestic Allotment Act, purchased commercial fertilizer outside of Florida and undertook its distribution to consumers within that state without state inspection or the payment of inspection fees. The Supreme Court affirmed the judgment of a special three-judge district court which enjoined interfering with the administration of the Federal Soil Conservation Act, on the ground that no state may interfere with the exercise by the United States of powers lawfully delegated to the Government or its agencies or interfere with the uniform administration of those laws in any state, the power of the Government in those respects being dominant over those of any state.**

*Mayo et al.* v. *U. S.*, 87 L. ed. Adv. Ops. 1082; 63 Sup. Ct. Rep. 1137; U. S. Law Week 4427. (No. 726, decided June 1, 1943.)

A Florida statute comprehensively regulates the sale and distribution of commercial fertilizers. A label or stamp is required evidencing the payment of an inspection fee. The inspection is intended to assure the quality of the fertilizer and that it contains no substances deleterious to the land. Unless on each bag there is such a stamp or certificate, the bags may be seized and sold by the sheriff of the county.

The United States, acting under the provisions of the Soil Conservation and Domestic Allotment Act and as a part of its soil conservation program, purchased commercial fertilizer outside of Florida and undertook its distribution to consumers within that state without state inspection and without performance of the other requirements of the Florida Act. Among other things, that program contemplated the use of fertilizers with a high content of superphosphate on winter legumes to be plowed under and thus obtain scarce nitrogen for the commercial crops which were to follow the winter legumes. The plan fails unless the fertilizer is applied and the legumes are planted prior to October 15.

The soil-building and soil-conserving practices are not compulsory but, when carried out by participating farmers, entitle them to a grant or benefit payment. In order that the farmer may earn this grant, phosphate fertilizers are furnished to him in advance by the Government through the county agricultural committee.

To carry out this program the fertilizers in controversy were shipped into Florida to a local agricultural association for distribution. As the sacks were without stamps, the Florida Commissioner of Agriculture on September 10, 1942, gave a "stop sale" notice to the county agricultural association to cease distribution.

The Attorney General of the United States directed the filing of a complaint against the Florida officials who are charged with the enforcement of the Florida law. The complaint set out the "stop sale" notice, the refusal of numerous persons, utilized by the United States in its work, to proceed with the distribution of the fertilizer without the protection of an injunction, the frustration of the conservation program, the imminency of irreparable damage because of the necessity for prompt distribution of the fertilizer and the lack of any efficient remedy, other than by an injunction. Florida objected to the complaint for failure to state a cause of action and set up numerous defenses not now material to be considered since the case was decided on a single ground.

The three-judge district court held that the Government "became the owner" of the fertilizer, at manufacturing plants outside of Florida and was engaged in distributing it in Florida as a part of the national soil conservation program; that in promoting soil conservation by precept and demonstration the United States, as in its other authorized activities, acts in a governmental capacity. That court, one judge dissenting, enjoined the application of Florida law to the above described acts of the United States on the ground of federal immunity from state regulation.

The case was appealed by the state authorities to the United States Supreme Court and the decision of the district court was affirmed. The opinion of the Court was delivered by Mr. Justice REED. After his statement of the record facts and the contentions of the parties, he opens the discussion of power and immunity from state regulation as follows:

> Since the United States is a government of delegated powers, none of which may be exercised throughout the Nation by any one state, it is necessary for uniformity that the laws of the United States be dominant over those of any state. Such dominancy is required also to avoid a breakdown of administration through possible conflicts arising from inconsistent requirements. The supremacy clause of the Constitution states this essential principle. Article VI. A corollary to this principle is that the activities of the Federal Government are free from regulation by

any state. No other adjustment of competing enactments or legal principles is possible.

The Florida authorities argued in support of the inspection fee that neither the Constitution nor any federal statute exempts the United States from paying reasonable state inspection fees to support reasonable regulation of commercial fertilizer, and that since the inspection is allowable to protect the farmers against the imposition of fertilizers of inferior quality, the inspection fee should be paid on fertilizers distributed by the United States where the federal law is silent as to any exemption on the ground of sovereignty.

That contention is rejected by the Court and on that point Mr. Justice REED says:

> It lies within Congressional power to authorize regulation, including taxation, by the state of federal instrumentalities. No such permission is granted here. . . . Congress may protect its agencies from the burdens of local taxation. There are matters of local concern within the scope of federal power which in the silence of Congress may be regulated in such manner as does not impair national uniformity. There are federal activities which in the absence of specific Congressional consent may be affected by state regulation.

Florida had relied upon the case of *Graves* v. *New York* (306 U. S. 466). Mr. Justice REED summarized and interpreted that case and distinguished it from the instant case. That case held that an employee of the Home Owners' Loan Corporation, a federal agency, sought exemption from New York's income tax on the ground that a tax upon the employee's salary imposed an unconstitutional burden upon the federal government. Upon full examination of the authorities and the reasoning on which earlier cases had allowed the employees of one sovereignty freedom from the exactions of the other, Mr. Justice REED says:

> These inspection fees are laid directly upon the United States. They are money exactions the payment of which, if they are enforceable, would be required before executing a function of government. Such a requirement is prohibited by the supremacy clause.

Other cases were reviewed including the recent *Penn Dairies* case (No. 399, decided March 1, 1943) and Mr. Justice REED closes his opinion as follows:

> In these cases the exactions directly affected persons who were acting for themselves and not for the United States. These fees are like a tax upon the right to carry on the business of the post office or upon the privilege of selling United States bonds through federal officials. Admittedly the state inspection service is to protect consumers from fraud but in carrying out such protection, the federal function must be left free. This freedom is inherent in sovereignty. The silence of Congress as to the subjection of its instrumentalities, other than the United States, to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction. *Shaw* v. *Oil Corp'n*, 276 U. S. 575, 578. But where, as here, the governmental action is carried on by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues.

Mr. Justice BLACK concurs in the result.

The case was argued by Mr. William C. Pierce and by Mr. James H. Millican, Jr., Assistant Attorney General of Florida, for the Florida authorities, and by Mr. Francis M. Shea, Assistant Attorney General for the United States.

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### Bankruptcy—Composition of Debts of a State Drainage District—Insufficiency of Findings

**A Florida drainage district became bankrupt. A plan for the composition of its debts under § 83(e) of the Bankrupcy Act was presented to the district court and approved. Holders of certain indebtedness which the plan placed in the category of Class II indebtedness challenged the fairness of the plan. It was approved by the district court. On appeal to the Supreme Court it was held that the findings were insufficient and too indefinite to enable the Court properly to pass upon the justice of the plan and that, either by findings or in an order or in an opinion, the district court must "indicate the factual basis for the ultimate conclusion."**

*Kelley et al* v. *Everglades Drainage District*, 87 L. ed. Adv. Ops. 1091; 63 Sup. Ct. Rep. 1141; U. S. Law Week 4432. (No. 935, decided June 1, 1943.)

This case involved the right of review before the Supreme Court of the United States of a plan for the composition of the debts of a drainage district organized under the laws of Florida. The courts below confirmed the plan under the federal Bankruptcy Act upon the finding of the district court that it was fair, equitable, and for the best interests of the creditors and did not discriminate unfairly in favor of any creditor or class of creditors.

The attack upon the plan of composition was brought by holders of interest coupons detached from bonds issued by the drainage district. Judgment had been rendered on those coupons and according to the plan of composition the debtor's bonds and interest coupons, designated as Class I indebtedness, "constitute a first charge against the taxes levied against lands in the district and have preference over Class II indebtedness." The contention was that the plan discriminates unfairly in favor of the Class II creditors.

The opinion refers to the rule laid down by the Bankruptcy Act and by Rule 52 of the Federal Rules of Civil Procedure, made applicable to bankruptcy cases by General Order in Bankruptcy No. 37, that the court "find the facts specially." It refers among others to the recent group of railroad reorganizations decided on March 15, 1943, in which it was said "minorities under the various reorganization sections of the Bankruptcy Act cannot be deprived of the benefits of the statute by reason of a waiver, acquiescence or approval by the other members of the class." The opinion also quotes from another decision that "the fact that the vast majority of security holders may have approved a plan is not the test of whether the plan satisfies the statutory standard. The former is not a substitute for the latter. They are independent."

Referring again to the Milwaukee reorganization case, the opinion points out that "the nature and degree of exactness of the findings required, depends on the circumstances of the particular case" . . . and it is said that in that case "we held that it was sufficient if the

Commision's report set forth its conclusion as to the prospective earning power of the reorganized road, with findings supporting its apportionment of future earnings among creditors and stockholders so as to preserve their relative priorities, together with reasons for its conclusions and essential supporting data."

Following that line of argument, the opinion declares:

> . . . Once the priority of liens has been determined, considered estimates of future earning power afford a substantial basis for appraising the interests of the respective lienors. As such estimates involve an element of prophecy, the reorganization of properties which cannot readily be liquidated requires resort to "practical adjustments, rather than a rigid formula." . . . Hence we concluded that findings of the future earnings of the reorganized railroad distributable to each class of security holders and creditors were an adequate substitute for findings of asset value in terms of dollars and cents, which we held could be dispensed with as affording no more than a delusive appearance of a certainty which the subject matter did not warrant.

Taking up the question of the element of uncertainty inherent in composition plans based upon future and uncertain earnings, the opinion says:

> Delusive exactness of findings is likewise not demanded in cases of municipal bankruptcy. But where future tax revenues are the only source to which creditors can look for payment of their claims, considered estimates of those revenues constitute the only available basis for appraising the respective interests of different classes of creditors. In order that a court may determine the fairness of the total amount of cash or securities offered to creditors by the plan, the court must have before it data which will permit a reasonable, and hence an informed, estimate of the probable future revenues available for the satisfaction of creditors.
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> And where, as here, different classes of creditors assert prior claims to different sources of revenue, there must be a determination of the extent to which each class is entitled to share in a particular source, and of the fairness of the allotment to each class in the light of the probable revenues to be anticipated from each source. To support such determinations, there must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion of fairness can rationally be predicated.

It is next declared that "the findings in the present case fall short of that requirement" and various uncertainties in the findings are pointed out and enumerated. For the prevention of misunderstanding as to the extent of detail which the finding should have, it was declared that the Court held only "that there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion." The opinion concludes as follows:

> Since the state of the record is such that a proper determination of the questions of law raised by petitioners' contentions as to the treatment of Class II creditors cannot be made in the absence of suitable findings, the petition for writ of certiorari is granted, the judgment is vacated, and the cause remanded to the District Court for appropriate action in conformity with this opinion.

Mr. Justice BLACK dissented. He stated that the petitioning creditors filed a motion to dismiss the proceeding which the district court overruled; that they appealed to the circuit court of appeals making contentions which the court found to be "technical in the extreme"; that when the case came back from the circuit court of appeals that court found from the entire record that the petitioners had by "unfounded and extremely technical contentions sought to obstruct the plan." He states his conclusion as follows:

> Reversal for more findings means still further delay in bringing about what is undoubtedly a much needed financial reorganization. While I am certain that the courts below could couch their findings in different and more words, I am by no means sure they could set out with greater clarity their conclusion that the evidence shows both groups of bondholders to have been accorded fair and equitable treatment. The decision of the Circuit Court of Appeals was made with full appreciation and after full consideration of the issues, the evidence, and the District Court's findings. Under these circumstances, I should prefer to deny certiorari, but since the Court has determined to grant review, I think we should not dispose of the case without first giving the parties an opportunity to argue the issues. On the record as I now see it, the findings were abundantly adequate, and the conclusion of the Circuit Court of Appeals was correct.

There was no argument in this case.

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### Criminal Law—Probation—Right of Appeal

**One Korematsu was found guilty by a federal district court of remaining in a California city where, after Pearl Harbor, the presence of a person of Japanese birth was prohibited. He was found guilty and placed on probation for five years. To solve a doubt as to its jurisdiction to hear an appeal under those circumstances, the circuit court of appeals certified to the Supreme Court a question whether a finding of guilty and an order that the defendant be placed on probation is a final decision reviewable upon appeal by a circuit court of appeals. The Supreme Court answered the question in the affirmative.**

*Korematsu* v. *U. S.*, 87 L. ed. Adv. Ops. 1086; 63 Sup. Ct. Rep. 1124; U. S. Law Week 4430. (No. 912, decided June 1, 1943.)

Korematsu was found guilty by the District Court for the Northern District of California of remaining in the City of San Leandro, California, in violation of a federal statute and orders issued thereunder. The district court's order was that he be placed on probation for the period of five years, the terms and conditions of the probation to be stated to the defendant by the probation officer of the district court. The order provided that the pronouncing of judgment should be suspended. Korematsu appealed to the Circuit Court of Appeals for the Ninth Circuit. That court certified to the Supreme Court a question whether an order in a criminal proceeding, in which neither imprisonment nor a fine is imposed by the district court, is an order reviewable on appeal by a circuit court of appeals. That question was answered by the Supreme Court in the affirmative.

The opinion of the Court was delivered by Mr. Justice BLACK, who said:

> The federal probation law authorizes a district judge "after conviction or after a plea of guilty or nolo contendere . . . to suspend the imposition or execution of sen-

tence and to place the defendant upon probation for such period and upon such terms" as seem wise. . . . we held that when a court had imposed a sentence and then suspended its execution, the judgment was final and would support an appeal. The question here is whether the judgment is equally final when the imposition of sentence itself is suspended and the defendant subjected to probation. The government concedes that this question should be answered in the affirmative.

It has often been said that there can be no "final judgment" in a criminal case prior to actual sentence, . . . In applying this general principle to a situation like that of the instant case, the Second and Fourth Circuit Courts of Appeal have concluded that they lacked jurisdiction to hear an appeal from an order placing a defendant on probation without first imposing sentence. . . . The Fifth Circuit appears to take the opposite view.

The cases cited in the respective briefs were discussed, analyzed, distinguished and applied, with particular reference to the phrase, "sentence is judgment," frequently used in the discussion of a similar question, and it was held that an order of probation where the defendant is under the "supervision" of a probation officer whose duty it is to report to the court concerning his activities and who, "at any time within the probation period . . . may issue a warrant" or where the court which has granted the probation may issue a warrant for arrest, support the conclusion that the probation order is "an authorized mode of mild and ambulatory punishment, the probation being intended as a reforming discipline."

Closing the opinion, Mr. Justice BLACK says:

The difference to the probationer between imposition of sentence followed by probation, as in the *Berman* case, and suspension of the imposition of sentence, as in the instant case, is one of trifling degree. Probation, like parole, "is intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity by clemency," . . . and this end is served in the same fashion whether or not probation is preceded by imposition of sentence. In either case, the liberty of an individual judicially determined to have committed an offense is abridged in the public interest. "In criminal cases, as well as civil, the judgment is final for the purpose of appeal 'when it terminates the litigation . . . on the merits' and 'leaves nothing to be done but to enforce by execution what has been determined.' " . . . Here litigation "on the merits" of the charge against the defendant has not only ended in a determination of guilt, but it has been followed by the institution of the disciplinary measures which the court has determined to be necessary for the protection of the public.

These considerations lead us to conclude that the order is final and appealable. Our answer to the question is Yes.

The case was argued by Mr. A. L. Wirin for Korematsu and by Mr. John L. Burling for the United States.

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**Removal from State to Federal Courts—Federal Jurisdiction in Removed Cases—Venue under the Clayton Act—Joinder of Claims—Rules 5, 15, 18, 81(c), Federal Rules of Civil Procedure**

**In an action removed from a state to a federal district court, the district court may enter a summary judgment, even though the state in which the action was commenced does not allow that procedure. If a defendant in a state court removes the action to a federal district court, interposes his defenses and files a counterclaim and the plaintiff moves to amend its declaration by adding the complaint for treble damages under the Clayton Act, that motion is properly denied because the Clayton Act provides that actions under that Act may be brought only in a district court in which the defendant resides or is found.**

*Freeman* v. *Bee Machine Company, Inc.*, 87 L. ed. Adv. Ops. 1074; 63 Sup. Ct. Rep. 1146; U. S. Law Week 4424. (No. 707, decided June 1, 1943.)

Petitioner Freeman is a resident of Ohio. Respondent Bee Machine Company is a Massachusetts corporation. The Company brought an action against Freeman in a Massachusetts court for breach of contract. Freeman was personally served in Massachusetts. He appeared specially and caused the action to be removed to the federal district court in Massachusetts, there being diversity of citizenship and the requisite jurisdictional amount. Freeman thereupon answered, interposing several defenses, and filed a counterclaim. He then moved for a summary judgment. Shortly before that motion came on to be heard, the Company moved to amend its declaration by adding a complaint under the Clayton Act for treble damages. The district court denied the Company's motion to amend and granted Freeman's motion for summary judgment. The circuit court of appeals sustained the ruling of the district court on the motion for summary judgment but disagreed with its view on the motion to amend. The Supreme Court granted certiorari because of the importance of the problem and the contrariety of views which had developed concerning it, and affirmed the judgment of the circuit court.

The opinion of the Court was delivered by Mr. Justice DOUGLAS. He declares that the jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction, and declares that the question involved is whether that rule is applicable to the facts above summarized.

Distinguishing the *Lambert* case, cited as one of the controlling cases, the opinion declares that it merely held that defects in the jurisdiction of the state court, either as respects the subject matter or the parties, were not cured by removal but could thereafter be challenged in the federal court.

*Erie Railroad Co.* v. *Tompkins* is applicable to diversity causes removed to the federal courts, but the right to amend or file a counterclaim is procedural and is, therefore, not governed by the *Erie Railroad* case.

Mr. Justice DOUGLAS says:

We see no reason in precedent or policy for extending that rule so as to bar amendments to the complaint, otherwise proper, merely because they could not have been made if the action had remained in the state court. If the federal court has jurisdiction of the removed cause and if the amendment to the complaint could have been made had the suit originated in the federal court, the fact that the federal court acquired jurisdiction by removal does not deprive it of power to allow the amendment. Though this suit as instituted involved only questions of local law, it could have been brought in the federal court by reason

of diversity of citizenship. The rule of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, is, of course, applicable to diversity causes removed to the federal courts as well as to such actions originating there. But if the federal court has jurisdiction of the removed cause . . . the action is not more closely contained than the one which originates in the federal court. The jurisdiction exercised on removal is original not appellate. . . . The forms and modes of proceeding are governed by federal law.

The opinion refers to the removal Act (28 U. S. C. § 81) which provided that in a suit which has been removed the district court shall "proceed therein as if the suit had been originally commenced in said district court and the same proceedings had been taken in such suit in said district court as shall have been had therein in said state court prior to its removal," and the opinion declares that while § 81 of that Act does not cure jurisdictional defects presented in the state court action, "It preserves to the federal district courts the full arsenal of authority with which they have been endowed." The opinion accordingly sustains the power to amend the pleadings.

The opinion next takes up the objection that the amendment of the pleadings could not be made, since § 4 of the Clayton Act provides that cases under that Act "may be brought only in a district court in the district in which the defendant resides or is found or has an agent." As to that contention Mr. Justice DOUGLAS says:

> That requirement relates to venue. But venue involves no more and no less than a personal privilege which "may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct." . . . On the face of the present record it would seem that any objection to venue has been waived. There is no indication in the record before us that any such objection was "seasonably asserted."

After disposing of the technical aspects of jurisdiction and venue presented to the Court, Mr. Justice DOUGLAS says:

> Petitioner was personally served in the state court action. After the removal of the cause he entered a general appearance and defended on the merits. He also filed a counterclaim in the action. He thus invoked the jurisdiction of the federal court and submitted to it. . . . He was accordingly "found" in the district so as to give the district court power to allow the complaint in that suit to be amended by adding a cause of action under § 4 of the Clayton Act. This venue provision was designed, as stated by Judge Learned Hand . . . "to remove the existing limitations upon the venue of actions between diverse citizens and to permit the plaintiff to sue the defendant wherever he could catch him." But "found" in the venue sense does not necessarily mean physical presence. . . . A corporation may be "found" in a particular district for venue purposes merely because it had consented to be sued there. The fact that it was present "only in a metaphorical sense". . . was not deemed significant. In the present case it is not important that at the time of this amendment petitioner had returned to Ohio and was not physically present in Massachusetts. He was conducting litigation in Massachusetts. He was there for all purposes of that litigation. Having invoked the jurisdiction of the federal court and submitted to it he may not claim that he was present only for the limited objectives of his answer and counterclaim. He was present, so to speak, for all phases of the suit. That presence satisfies the venue provision of § 4 of the Clayton Act for the purpose of this amendment.

The opinion then considers the applicable provisions of the Federal Rules of Civil Procedure. It is pointed out that those rules are by Rule 81 (c) made applicable to remove cases and "govern all procedure after removal"; that Rule 18 permits joinder of claims; that Rule 15 lays down the procedure for amendment of pleadings; that the applicable federal statute directs the district court after a case has been removed to "proceed therein as if the suit had been originally commenced in said district court."

Applying these considerations to the case at bar, Mr. Justice DOUGLAS closes his opinion as follows:

> There can be no doubt but that the court had the power under that statute and under the Rules to permit the joinder of the cause of action under the Clayton Act. If petitioner was subject to the jurisdiction of the court for purposes of the law suit, including an amendment of the complaint, he certainly was "found" there for the purpose of adding a cause of action under § 4 of the Clayton Act. Process is of course a different matter. But under the Rules of Civil Procedure service of an amended complaint may be made upon the attorney (Rule 5)—the procedure which apparently was followed here.

Mr. Justice FRANKFURTER filed a dissenting opinion in which Mr. Justice ROBERTS, Mr. Justice REED, and Mr. Justice JACKSON joined. The opinion points out that in only a few special classes of cases Congress has given a very restricted right to sue elsewhere than as specified in the removal Act.

> Congress has power, of course, to authorize a suit arising under federal law to be brought in any of the federal district courts. . . . But from the beginning of the federal judicial system, Congress has provided that civil suits can be brought only in the district where the defendant is an inhabitant, except that where federal jurisdiction is based solely upon diversity of the parties' citizenship, suit may be brought in the district of the residence of either the plaintiff or the defendant.

Those instances are catalogued and summarized and Mr. Justice FRANKFURTER states his first point of dissent as follows:

> In holding that the petitioner was "found" in the district of Massachusetts merely because he had exercised his statutory right to remove a suit to the federal district court in Massachusetts, the Court, I cannot but conclude, is disregarding the venue requirements of the Clayton Act.

He then reviews the record and calls attention to the reasons which the district court assigned in support of its refusal to permit the amendment in question. The part of the opinion thus referred to, reads as follows:

> "This court has jurisdiction under the anti-trust laws over a nonresident only if he is found in the district or has an agent therein. 15 U. S. C. § 15. The defendant while in the Commonwealth was served with process in a common law action of contract. The plaintiff [respondent] obviously seeks to take advantage of this fact in order to obtain jurisdiction over the person in a suit involving a new and entirely different subject-matter,

namely, the enforcement of rights arising under federal statutes. . . . It follows from the foregoing that if the plaintiff is allowed to add the cause of action alleged in its motion, the amended complaint would be subject to successful attack on jurisdictional grounds. . . . The motion is, therefore, denied without prejudice to plaintiff's right to seek redress by suit brought originally in the Federal court." 42 F. Supp. 938, 939.

Although the record contains no specific objection by Freeman to the amendment of the complaint by adding the counterclaim for treble damages under the anti-trust laws, the opinion points out that the district court in its findings indicated that definite issue was taken as to the right of the district court to allow the amendment because the Clayton Act did not permit it and that the question of venue was therefore actually even if not specifically raised. The opinion of the circuit court was quoted to demonstrate that the petitioner was not regarded by that court as having waived his objections to jurisdiction or venue.

On that question, Mr. Justice FRANKFURTER says:

I quite agree with the Court that venue is a privilege that may be waived, that it "may be lost by failure to assert it seasonably." . . . But the waiver must be actual, not fictitious. There must be a surrender, not resistance. No doubt a party who, having a valid objection to the venue of a suit, pleads to the merits instead of making objection waives his objection. . . . Here the petitioner answered the state suit before and not after the respondent sought to amend its complaint to add an exclusively federal cause of action under the anti-trust laws. His defense to the contract claim could not possibly waive any venue objections with respect to a claim subsequently made under the anti-trust laws. One cannot waive an objection which he cannot assert.

As to the effect of the provisions of the Federal Rules of Civil Procedure, referred to in the prevailing opinion, it is pointed out that Rules 15 and 18, which established liberal rules for the joinder of claims, do not dispense with the requirements of venue and that Rule 82 expressly provides that "these rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions thereon."

Passing to the discussion of the applicable rules, Mr. Justice FRANKFURTER says:

The provision of the removal statute that once a suit is removed, the district court shall "proceed therein as if the suit had been originally commenced in said district court," . . . in no wise extends the jurisdiction or venue of the district court after removal. The provision means only that when a suit is removed to the federal courts, it shall be disposed of in the manner in which business is conducted there. The requirement of federal law that there be a unanimous verdict of the jury, for example, applies even to suits removed from a state court where a majority of eight can render a verdict. . . . Of course, therefore, the Federal Rules of Civil Procedure are equally applicable to suits removed to the federal courts. Rule 81 (c). But the venue restrictions imposed by federal legislation and left undisturbed by the Rules are not eliminated merely because the suit is one which has been removed. The venue of the federal court is the same, whether the suit be originally instituted in or removed to the federal court. It certainly is not enlarged by the fact of removal.

The opinion then continues the discussion of § 4 of the Clayton Act and particularly the definition of the phrase, "may be bound." Mr. Justice FRANKFURTER says:

I know of no case which has construed the requirement of "found," as applied to a natural person, to mean anything less than actual physical presence. The *Neirbo* case is obviously without relevance here. The problem there was that of fitting a fictive personality into legal categories designed for natural persons. A corporation is never "found" anywhere except metaphorically. In recognition of this fact the *Neirbo* case held that when a corporation assents to the conditions governing the doing of business within a state, it is as much "found" there for purposes of federal law as for those of state law. But in the case of a natural person, he can be "found" not metaphorically but physically. And when a person is not actually physically present in a place, he is not, "so to speak," "found" there except in the world of Alice in Wonderland.

As to the derivative nature of the removal jurisdiction, Mr. Justice FRANKFURTER says:

By removing a suit to the federal court a defendant is subjected to a liability—namely, to be sued in a district where he is neither a resident nor found, under a statute providing that he can be sued only where he is either a resident or found—from which he would be free if he remained in the state court. In other words, the right of removal is curtailed by depriving a defendant of territorial immunities from suit given by Congress in the enforcement of federal statutes, presumably because it deemed place for suit important in a country having the dimensions of a continent.

The case was argued by Mr. Marston Allen for Freeman and by Mr. Cedric W. Porter for Bee Machine Company, Inc.

# SUMMARIES

**Criminal Law—Application of Convicted Defendant for Leave to Appeal as a Poor Person—District Court Has Power and Duty to Act on Application**

*Steffler* v. *U. S.*, 87 L. ed. Adv. Ops. 924; 63 Sup. Ct. Rep. 948; U. S. Law Week 4363. (No. 14, Original, decided May 3, 1943.)

Steffler was tried for a federal offense in a United States district court and convicted. He applied to the district court for leave to appeal to the circuit court of appeals in forma pauperis. The district court declined to consider his application, on the ground that it had no jurisdiction to entertain such a petition, but that the defendant should have applied to the circuit court of appeals. Thereupon he applied as directed and the circuit court of appeals denied his application. He then petitioned the Supreme Court for certiorari and for leave to proceed in that Court in forma pauperis. The Supreme Court granted leave, allowed the writ, and remanded the cause to the district court, which, the Supreme Court held, had misconstrued the statute governing appeals in forma pauperis. The only point decided in this opinion *(per curiam)* was that the district

court had the power and duty to consider and pass upon the application for leave to appeal as a poor person.

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**Emergency Price Control Act of 1942—Emergency Court of Appeals—Jurisdiction of District Courts Withdrawn**

*Lockerty et al.* v. *Phillips*, 87 L. ed. Adv. Ops. 958; 63 Sup. Ct. Rep. 1019; U. S. Law Week 4376. (No. 934, decided May 10, 1943.)

The question for decision here was whether jurisdiction of the federal district courts to enjoin enforcement of price regulations prescribed by the Administrator under the Emergency Price Control Act of 1942 was validly withdrawn by § 204 (d) of that Act.

The appellant, engaged in the wholesale meat business, brought suit in a federal district court to enjoin enforcement of price regulations of the Administrator, without proceeding as required by the Emergency Act. The district court of three judges dismissed the suit for want of jurisdiction.

On direct appeal the ruling was affirmed by the Supreme Court in an opinion by the CHIEF JUSTICE. He points out that the Emergency Act itself provides for judicial review, in the Emergency Court created by the Act, of action of the Administrator upon the complaint of any person aggrieved thereby. It is emphasized also that the rulings of the Emergency Court are subject to review by the Supreme Court on certiorari. Section 204 (d) of the Act deprives all other courts of jurisdiction to enjoin regulations, orders and price schedules of the Administrator.

The Supreme Court concludes that Congress has, and properly exercised, power to withdraw from all other courts and to confer on the Emergency Court jurisdiction to review regulations and orders of the Administrator, and that the appellant, having failed to pursue the administrative remedy granted by the Act, had no standing to maintain his suit for an injunction in the district court.

The case was argued by Mr. Arthur T. Vanderbilt for Lockerty and by Mr. Thomas I. Emerson for Phillips.

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**Federal Criminal Jurisdiction**

*Adams et al.* v. *U. S. et al.*, 87 L. ed. Adv. Ops. 1025; 63 Sup. Ct. Rep. 1122; U. S. Law Week 4417. (No. 889, decided May 24, 1943.)

In answer to questions certified by the United States Circuit Court of Appeals for the Fifth Circuit, the Supreme Court, in an opinion delivered by Mr. Justice BLACK, holds that soldiers can not be indicted or tried for criminal offenses committed in a government military camp unless the government had not only acquired title to the site at the time of the commission of the crime, but had also filed with the governor of the state a notice of the acceptance of jurisdiction, as required by law. (40 U.S.C. § 265)

The case was submitted on brief by Mr. Thurgood Marshall for Adams et al., and by Mr. Robert L. Stern for United States et al.

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**Emergency Rent Control—Collusion**

*U. S. et al* v. *Johnson*, 87 L. ed. Adv. Ops. 1027; 63 Sup. Ct. Rep. 1075; U. S. Law Week 4420. (No. 840, decided May 24, 1943.)

An action was brought by a tenant against his landlord, in a federal district court, in which the complaint alleges that the property rented and occupied by him was within a defense rental area, that the Emergency Price Administrator had promulgated a maximum price regulation; that the rent paid by the tenant and collected by the landlord appellee was in excess of that maximum. The complaint demanded treble damages and reasonable attorney's fees, as prescribed by § 205 (e) of the Emergency Price Control Act of 1942. The United States intervened and filed a brief in support of the constitutionality of the Act. The district court dismissed the complaint on the ground that the Act and the promulgation of the regulation under it were unconstitutional because Congress by the Act had unconstitutionally delegated legislative power to the Administrator.

Before entry of the order the Government moved to reopen the case on the ground that it was collusive and did not involve a real case or controversy. That motion was denied. The district court allowed the tenant an appeal to the Supreme Court, but the tenant's appeal had not been docketed because of his failure to comply with the rules of the court.

The district court also allowed an appeal to the Government. The Government had duly perfected its appeal and assigned error both to the ruling of the district court on the constitutionality of the Act and its refusal to reopen and discuss the case as collusive. Although the tenant had not complied with the rules of the court, the two appeals were consolidated and heard as one case.

Two questions accordingly arose, "whether any case or controversy exists reviewable in this Court, in the absence of an appeal by the party plaintiff in the district court" and "whether the suit was collusively brought."

On these points the *per curiam* opinion says:

> Here an important public interest is at stake—the validity of an Act of Congress having far-reaching effects on the public welfare in one of the most critical periods in the history of the country. That interest has been adjudicated in a proceeding in which the plaintiff has had no active participation, over which he has exercised no control, and the expense of which he has not borne. He has been only nominally represented by counsel who was selected by appellee's counsel and whom he has never seen. Such a suit is collusive because it is not in any real sense adversary. It does not assume the "honest and actual antagonistic assertion of rights" to be adjudicated—a safeguard essential to the integrity of the judicial process, and one

which we have held to be indispensable to adjudication of constitutional questions by this court. . . . Whenever in the course of litigation such a defect in the proceedings is brought to the court's attention, it may set aside any adjudication thus procured and dismiss the cause without entering judgment on the merits. It is the court's duty to do so where as here, the public interest has been placed at hazard by the amenities of parties to a suit conducted under the domination of only one of them. The district court should have granted the Government's motion to dismiss the suit as collusive. We accordingly vacate the judgment below with instructions to the district court to dismiss the cause on that ground alone.

The case was argued by Mr. Paul A. Freund for the United States and by Mr. Vernon M. Welsh for Johnson.

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**Practice — Direct Appeals to Supreme Court in Criminal Cases — United States Code Section 681, Title 18, superseded by Judicial Code, 36 Stat. 1157**

*Max Stephan* v. *United States*, 87 L. ed. Adv. Ops. 1097; 63 Sup. Ct. Rep. 1135; U. S. Law Week 4434 (No. ——, decided June 1, 1943.)

Stephan applied to the Supreme Court for the allowance of a direct appeal as of right from a judgment of the federal district court sentencing him to death. His contention was that his appeal may be taken pursuant to a section appearing in the United States Code as Section 681 of Title 18. Stephan had been convicted of treason after a jury trial. The circuit court of appeals affirmed the conviction and sentence, and an application for certiorari was denied by the Supreme Court. Stephan contended that, in addition to the appellate review already accorded him, he might appeal as of right under the above cited section of the Code which authorizes an appeal "in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States."

In a *per curiam* opinion the Supreme Court denied the application for leave to appeal and vacated a stay previously granted.

The opinion reviews the legislative history of acts regulating criminal appeals in relation to the provision relied upon by Stephan and concludes that Section 681 was finally extinguished by the enactment of the Judicial Code in 1911 at which time the jurisdiction of the Supreme Court in capital cases was transferred to the circuit court of appeals. The Court observes that, although the words of Section 681 have lingered on in successive editions of the United States Code, nevertheless the Code by virtue of 1 U.S.C. Section 54 (a), establishes merely "prima facie" the laws of the United States, and cannot prevail over the Statutes at Large, when the two are inconsistent.

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**Practice — Appeals to Supreme Court — Time Limit on Application for Leave to Appeal**

*Matton Steamboat Co., Inc. et al v. Frieda S. Miller, et al.; Lake Tankers Corporation v. Frieda S. Miller, et al.*, L. ed. Adv. Ops. 1095; 63 Sup. Ct. Rep. 1126; U. S. Law Week 4432. (Nos. 783, 813, decided June 1, 1943.)

A *per curiam* opinion in this case construes 28 U.S.C.A. § 350 which provides that "no appeal . . . intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefore be duly made within three months after the entry of such judgment or decree."

These two cases involve the validity of the New York Unemployment Insurance Law which the state courts sustained. In each case within three months after the judgment in the court of appeals, timely application was made to the chief judge of the state court of appeals who denied the applications shortly before the expiration of the three months' period. Shortly after that period expired, applications were made to an Associate Justice of the Supreme Court for leave to appeal, which appeals were allowed with the approval of the Court in order to settle a question of practice.

The opinion points out that there is nothing in the rules of the Supreme Court to preclude application within the three months' period to both a state judge and to a Supreme Court Justice. The Court's conclusion is that the applications for allowance of the appeals, after the expiration of the three months' period were too late, notwithstanding the timely but unsuccessful applications to the state court, and that the Court was without jurisdiction to entertain the appeals. Accordingly, they were dismissed.

The case was argued by Mr. Frank C. Mason for the appellants in No. 783; by Mr. Francis S. Bensel for appellants in No. 813; and by Mr. Orrin G. Judd, Solicitor General of New York for appellee.

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*THE strength of our profession lies in its unity, and from a patriotic standpoint we simply cannot allow the power and influence of our Bar Association to be lessened or impaired. Let them have the combined energy of all who, on the home front, are charged with the maintenance of law, order and the performance of public duty.*

HON. JOHN C. KNOX
*U. S. District Court*

# WAR NOTES

By TAPPAN GREGORY

Of the Chicago Bar

IN the District Court for the Northern District of Indiana, South Bend Division, there is a holding that it was never the intention of Congress that the Administrator of the Emergency Price Control Act should be empowered to create defense rental areas or fixed rentals without hearings or determinations of fact. A construction of the Act to sanction such a power would render the Act unconstitutional as a delegation of legislative power and as contrary to due process of law.

In a case for damages for wrongful death commenced before the beginning of the war between the United States and Germany, it appeared that plaintiff, the widow and only heir-at-law of decedent, was a citizen of Germany, residing peaceably, by permission of the authorities, in this country. The lower court on motion of the defense granted a continuance for the duration of the war. The Court of Appeals of Ohio, Stark County, held that neither the Alien Enemy Act nor the Trading with the Enemy Act precludes the continued prosecution of the action after the commencement of the war and that the right of one in the position of the plaintiff in this case to resort to our courts for redress is guaranteed by both the federal and state constitutions.

In Iowa there is a statute exempting from taxation certain property of every honorably discharged soldier of the war with Germany. This Act was in effect after the close of the last war. The plaintiff below was called under the Selective Draft Act of 1917 to report on November 11, 1918, for induction. He was told he was then in the military service and was put in charge of a contingent to entrain for Camp Dodge. Before it was put into effect, the order was countermanded. Later he received a "discharge from draft." The Supreme Court of Iowa held that he did not fall within the category provided by the statute as an honorably discharged soldier.

The Supreme Court of New York, Special Term, Queens County, extended the life of a blood certificate obtained by a soldier as a prerequisite to the right to marry under the Domestic Relations Law, where it appeared that the soldier by reason of military exigencies was unable to obtain leave within the time limited by the certificate and that the certificate and a later report made by the military medical detachment, not in the form prescribed by the statute, both showed satisfactory results of the blood test.

Neither the Naval Reserve Act nor the Selective Training and Service Act prevented the continuance of plaintiff's private activities after his induction into the Navy nor prohibited payment of compensation to him by the defendant under their contract. The Supreme Court of New York, Special Term, Queens County, therefore held that the defendant could not terminate the contract.

In an application to modify a divorce decree, it was held by the Supreme Court of Florida, Division B, that the fact that the divorced husband was placed in Class 1-A by his local draft board, subject to prompt induction, did not justify the modification of the alimony decree in his favor, on the ground that his earnings would be reduced after his induction.

The regulations of the Selective Training and Service Act, providing that no alien enemy can be inducted unless acceptable to the land or naval forces, supplemented by regulation of the Secretary of War against acceptance over the objection of the alien enemy, are regulations provided for the benefit of the army and where the alien enemy states in writing, "I am willing to serve in the armed forces of the United States but cannot feel free to offer my services for combat duty," and was accepted in the army, he will be denied relief of writ of habeas corpus, according to the decision of the District Court for the District of Massachusetts.

In Kentucky a judgment for $200 was recovered against a soldier. Because of his military service he could not be present at the trial. Motion for continuance on his behalf was denied. The Court of Appeals of Kentucky held this an abuse of discretion by the lower court and the case was reversed.

The Supreme Court of Arkansas has held that an order staying proceedings in an ejectment suit, under the Soldiers' and Sailors' Civil Relief Act, was not a final order and therefore not appealable.

The Supreme Court of New York, Rockland County, granted a motion for an order to take the deposition of a material witness in the military service stationed out of the state, even though it appeared that he came home on leave from time to time. The court found that there were reasonable grounds to believe that this witness might not be able to attend the trial, within the meaning of the statute.

In the Circuit Court of Appeals for the Ninth Circuit, it is held that the Governor of the Hawaiian Islands was authorized by the Federal Constitution and by the Acts of Congress to suspend the privilege of the writ of habeas corpus until further notice after the attack on Pearl Harbor.

# BOOK REVIEWS

*Lie Detection and Criminal Interrogation,* by Fred Inbau. 1942. Baltimore: Williams & Wilkins Company. Pp. 142. $3.—Here is a book that should occupy an important position in the library of every law enforcement officer and every member of the legal profession. It fills a very definite need in that critical phase of investigational technique—deception and its detection. Mr. Inbau is eminently qualified to write such a book. His scientific approach becomes evident when he expresses the hope that the book will serve not only as a practical and useful manual for criminal interrogators but that it will also stimulate further interest, research and progress in the art of lie detection and criminal interrogation. The material is presented in a practical and understandable manner.

The author has brought together within the covers of one book an effective summary of available resources and methods in the twin fields of deception detection and police interrogation. The first part of the book—"The Lie-Detector Technique"—is an illustrated discussion of the methods used in the detection of deception from recordings of physiological phenomena such as changes in blood pressure, pulse, respiration, and electrodermal responses. The second part—"Criminal Interrogation"—explains in clear language the various tactics and techniques which may be used by any law enforcement officer in the daily task of interviewing suspects, witnesses and others for the purpose of eliciting confessions or other helpful information. Of interest to both officer and lawyer is the fact that each part is supplemented with a treatment of the legal aspects of the subject-matter.

Profusely illustrated with self-explanatory cuts and drawings, the material on instrumental aids in the detection of deception offers to criminal investigators a clear and convincing explanation of the lie-detector and the technique of its application in actual case in investigations. The psychologist, physiologist, as well as other scientific groups, will find here ample incentive for exploring further the possibilities of this method in the analysis of reactions to the emotional experience. If the book does nothing else, it presents a candid study and appraisal of this much debated and misunderstood subject.

All crime depends for insurance against detection upon the veil of deception. A large part of the time and energy of the law enforcement officer is invested in the effort to penetrate the lie of guilt and to corroborate the claims of the innocent. The second part of the book—"Criminal Interrogation"—signals the transition period between the so-called and sometimes overdramatized third degree methods of the old school and the sheer intellectual superiority of a trained police force as it achieves the result through skillful interrogation of suspects and witnesses in criminal case investigations. Although this section of the book is of great practical utility to the lie-detector operator, it is intended primarily for the average police officer who does not have the aid of such instruments. The author proceeds forthwith to deal with the practical aspects of the interrogator's problems and to provide the officer with a practical working manual covering the basic elements of interrogation technique. This book should be included as an integral part of every departmental in-service police training program, and should be read and studied by every police officer. Indicating the permanent character of its contribution to the literature of police science, the reader will discover in this volume a wholesome challenge to further research and exploration in this important field.

*Elements of Police Science,* by Rollin Perkins. 1942. Chicago: Foundation Press, Inc., Pp. 651. $4.75.—It is understandable that Professor Perkins might have produced this noteworthy contribution to police literature as an answer to the need for textbook materials in connection with Iowa Peace Officers' Short Course, of which he is Director. In doing so, he gave to the police of the nation a comprehensive and invaluable treatise covering the daily performance requirements of the police officer. This book reveals once again the incontrovertible fact that the police enterprise is a technical undertaking, and that intensive training of a high order is necessary in the grooming of a man for police service.

The book is divided into two parts, "Special Problems of Police Science" and "Introduction to Criminal Law." In Part I, Professor Perkins has assembled a series of thirteen outstanding chapters dealing with police problems of vital interest to every law enforcement officer and authored by men whose names are well known in police circles throughout the nation. Chief August Vollmer, dean of the American police field, measuring up to the superb quality of his many contributions to police service, prepared the chapter on "Criminal Investigation." This material should be incorporated into every in-service police training program in the country. Other chapters of equal significance include "Detection of Counterfeit Money" by Frank J. Wilson, Chief, United States Secret Service, Treasury Department; "Police Courtesy" by Oscar G. Olander, Commissioner and head of that outstanding force, the Michigan State Police; "On the Witness Stand" by Mason Ladd, Dean of the College of Law, University of Iowa; "Moulage" by R. W. Nebergall, Chief of the Iowa Bureau of Investigation; "Photography" by Frederick W. Kent, University Photographer, University of Iowa; "Fingerprints" by Harold J. E. Gesell, Special Agent, Iowa Bureau of Investigation, assigned to the Technical De-

partment; "First Aid" by Dr. Fred J. Jarvis, Seattle, Washington, and "Revolver Shooting" by J. F. Butler, Lt. Col., Infantry, U. S. A., Fort Bragg, North Carolina.

In writing Part II, "Introduction to Criminal Law," Professor Perkins has presented in a most effective manner the basic elements of Criminal Law, including an interpretation of the various offense classifications, which should become a basic part of the knowledge of every law enforcement officer. The volume concludes with an appendix which gives added momentum to the movement toward interstate uniformity of laws affecting fresh pursuit and extradition procedure. The reader is delighted to find a complete and effective index to the wide range of information presented in this volume.

The short course in-service training program has, within the past twenty years more or less, become an institution in the American police field. In every section of the country intensive training sessions have been organized and held periodically in order that the police officer might increase the range of his technical ability and skill. The spread of this training pattern has been supplemented by the organization of training schools within police departments. To devise an effective curriculum with well organized teaching materials properly oriented and directed, has been one of the major problems of the police training field. The *Elements of Police Science*, by Professor Perkins, represents a major contribution toward the solution of this problem, and it should enjoy a wide circulation among police training schools and police officers generally. Further, the increasing number of colleges and universities in this country now becoming interested in the application of their huge resources to the professional training of police officers at the pre-entry level, presents additional opportunities for the effective use of this excellent volume.

V. A. LEONARD

Department of Police Science and Administration,
State College of Washington

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*Education for Freedom*, by Robert Maynard Hutchins. 1943. Louisiana State University Press. Pp. 108.—President Hutchins of the University of Chicago has been called a medievalist and scholastic, a foe of modernism in education. Some years ago his attacks on our universities and colleges, or their curricula and pedagogical ideas, provoked a sharp reply from Professor John Dewey, the leader of the progressive education movement. But Mr. Hutchins was either misunderstood in those early days or else he was unfortunate in the presentation of his thought. At any rate, in recent articles and in the lectures which comprise the little book under notice here Mr. Hutchins says nothing that can be challenged by any liberal or philosophical thinker. He wants our schools and colleges to become truly educational institutions. He wants to eliminate football, restrict the "side-shows," and enhance the value and importance of the "main tent." He ridicules some of the newer courses—cosmetology, drum-major training, vocationalism, etc. He demands a rational basis for education, unity and coherence in the courses, attention to essentials, and an effort to train the intellect and at the same time inculcate goodness and love of beauty.

He holds that education for freedom or democracy implies standards of conduct, guiding principles, a philosophy of society, government, and individual conduct. Certainly this is not absolutism or dogmatism. It is common sense.

Our educational system has been chaotic and futile. It should be thoroughly reconstructed; time-wasting activities should be eliminated, idleness and snobbery discouraged, and hard work demanded of the students.

In the book under notice these ideas are set forth with humor, wit, and vigor. The special problems facing education in war or emergencies are very ably and profitably discussed in the light of the deeper and permanent problems. We may not accept some of Mr. Hutchins' definitions—of scientism or metaphysics, for example—but he is sound and right in his major propositions, in his emphasis on the social sciences, the liberal arts, method and synthesis. He should be read without prejudice, born perhaps of certain pardonable exaggerations and paradoxes.

## RECENT PUBLICATIONS

THE PROBLEMS OF LASTING PEACE, by Herbert Hoover and Hugh Gibson. Revised edition, 1943. Garden City, New York: Doubleday, Doran and Company, Inc. Pp. 303. $2.

THE DAY OF RECKONING, by Max Radin. 1943. New York: Alfred A. Knopf. Pp. 144. $1.75.

WARTIME FACTS AND POSTWAR PROBLEMS, edited by Evans Clark. 1943. New York: The Twentieth Century Fund. Pp. 136. 50c.

LOSS OF CITIZENSHIP—DENATURALIZATION—THE ALIEN IN WARTIME, by John L. Cable. 1943. Washington, D. C.: National Law Book Company. Pp. 149. $4.

NEW YORK LAWS AFFECTING BUSINESS CORPORATIONS, edited by J. B. R. Smith. 24th Ed. 1943. New York: United States Corporation Company. Pp. 588. $2.

OUTLINES OF LECTURES ON JURISPRUDENCE, by Roscoe Pound. Fifth edition, 1943. Cambridge: Harvard University Press. London: Humphrey Milford, Oxford University Press. Pp. 244. $3.

TOWARDS AN ABIDING PEACE, by R. M. MacIver. 1943. New York: The Macmillan Company. Pp. 195. $2.50.

## Proposed Amendments

*(Continued from page 388)*

AMERICAN BAR ASSOCIATION JOURNAL which is $1.50 per year. Any sustaining member may become a regular member of the Association by payment only of the regular dues as provided by Article II, Section 1."

The above amendments have been submitted to the Committee on Rules and Calendar, and approved by a majority of that committee for publication.

III.

Notice is hereby given that the Board of Governors of the American Bar Association, by virtue of a resolution unanimously adopted, propose the following amendment of Article I, Section 2 of the By-Laws of the Association, by striking out from said section the last sentence thereof reading as follows:

"Two negative votes in the Board of Governors shall prevent an applicant's election."

and inserting in lieu thereof the following:

"A majority vote of the Board of Governors shall be required to elect a nominee to membership in the Association."

to the end that said section shall read as follows:

Section 2. *Election of Members.*—All nominations made pursuant to Section 1 hereof shall be reported to the Board of Governors for action. A majority vote of the Board of Governors shall be required to elect a nominee to membership in the Association."

HARRY S. KNIGHT, *Secretary.*

## NOTICE TO MEMBERS OF JUNIOR BAR CONFERENCE

**Notice is hereby given that at the annual meeting of the Junior Bar Conference to be held in Chicago, Illinois, beginning August 22, 1943, there will be elected a Chairman, Vice Chairman, and Secretary, each for a term of one year, a member of the Executive Council from each of the First, Third, Fifth, Seventh and Ninth Judicial Circuits, and the District of Columbia, each for a term of two years, and from each of the Second, Fourth, Sixth, and Tenth Judicial Circuits (to fill vacancy), each for a term of one year.**

Pursuant to Section 4(B) of Article IV of the By-Laws, notice is hereby given that the members of the Junior Bar Conference residing in the above named Judicial Circuits and District of Columbia (hereinafter referred to as Council Districts) may nominate candidates for the office of member of the Council from their respective districts by written petition, in each case, specifying the name of the person nominated and the office for which nominated, containing the names of at least twenty endorsers, all of whom are residents of the district of the person nominated. The petition can state briefly a biographical sketch of the background and qualifications of the candidate. It shall be submitted to the Chairman, Joseph D. Calhoun, 218 W. Front St., Media, Pennsylvania, not later than August 7, 1943. At the first session of the annual meeting, the Chairman of the Conference shall deliver to the Chairman of the Nominating Committee all petitions submitted pursuant to this notice.

The Nominating Committee shall consider the candidates proposed by each of said petitions, as well as receive names of other candidates and report its Council nominees at the same time and place, and in the same manner that it reports the nominations for the officers of the Conference. Other nominations for the Council may be made from the floor following the report of the Nominating Committee, as may other nominations also be made for officers. The election of Council members shall take place at the same time and place, and in the same manner as the election of officers, immediately following the conclusion of the second general session of the annual meeting, and shall be by written ballot.

TERM OF OFFICE: The term of office of the officers and the Council members from the Second, Fourth, Sixth and Tenth Judicial Circuits elected at the Chicago annual meeting shall begin with the adjournment of the said annual meeting and end with the adjournment of the annual meeting to be held in 1944, or until their successors shall be elected and qualify, and the term of office of the Council members from the First, Third, Fifth, Seventh, and Ninth Judicial Circuits, and the District of Columbia, shall begin with the adjournment of the said annual meeting and end with the adjournment of the annual meeting to be held in 1945, or until their successors shall be elected and qualify.

ELIGIBILITY: No person shall be elected as an officer or member of the Council if he will, during his term of office, become ineligible for membership in the Conference. The membership of a member of the Conference shall terminate at the conclusion of the annual meeting in the calendar year within which the member attains the age of thirty-six years, or upon his ceasing, prior to that time, to be a member of the American Bar Association. A person elected as a member of the Council shall be, at the time of his nomination, a resident of the Council District for which he is chosen. No person shall be eligible for election as a member of the Executive Council if he is then a member of the Council and has been such a member for a period of three years or more.

HUBERT D. HENRY, Secretary
Junior Bar Conference of the
American Bar Association.

# JUNIOR BAR NOTES

By HUBERT D. HENRY

Secretary, Junior Bar Conference

THE Second War Meeting and Tenth Annual Meeting of the Junior Bar Conference will be held in Chicago from August 22 to 24. In view of the importance of the war work being done by the Junior Bar Conference, especially through the Committees on Legal Assistance to the Armed Forces, War Readjustment, and Traffic Courts, it is felt that this meeting is fully justified even though the government has requested that all unnecessary travel be curtailed. The principal business to come before the meeting will be the war work of the Conference, primarily as being carried on through the personnel.

Chairman Calhoun announces the appointment of a Program Committee for the meeting, consisting of Albert E. Jenner, Jr., of Chicago, chairman; Malcolm I. Ruddock, New York; Leon Sarpy, New Orleans, and Morris I. Leibman, Chicago. Mr. Leibman will also serve as chairman of the Committee on Local Arrangements. Two general sessions are planned together with an informal reception on the first day. Prominent speakers have been invited to address the Conference.

The Third Annual Meeting of delegates from state and local junior bar groups will be held on Monday, August 23, at the Drake Hotel. The Conference will again give awards of merit to affiliated junior bar groups. One award will be for special war work and one for general bar association activity to state junior bar groups and to local junior bar groups. All junior bar groups affiliated with the Junior Bar Conference have been invited to submit reports of their activities for the past year.

Lyman M. Tondel, Jr., New York City, chairman of the War Readjustment Committee, continues to get enthusiastic responses to the letter of the committee sent to all bar associations and junior bar groups. Among the associations which have adopted or are considering the resolution contained in the letter are: New York County Lawyers' Association, West Virginia Bar Association, Carroll County (Iowa) Bar Association, North Carolina State Bar, Brooklyn (New York) Bar Association, Bar Association of the District of Columbia, Younger Members' Committee of Chicago Bar Association, Lawyers' Club of Alameda County (California), Albuquerque (New Mexico) Lawyers' Club, and New Jersey State Bar Association. Committees of the Association of American Law Schools are studying the report. Mr. Tondel would like to hear of any further action being taken by associations.

Watson Clay, Louisville, Ky., chairman of the Traffic Court Committee, has received a report approving the Traffic Court program of the Junior Bar Conference from the Younger Members' Committee of the Chicago Bar Association. The Traffic Court Committee of the Junior Bar Section of the District of Columbia Bar Association has completed its study of the program and has adopted a progressive campaign for securing further improvements in the local courts. A meeting of representatives of the New Hampshire State Bar Association and other groups interested in Traffic Courts and traffic safety was held at the Nashua Country Club, Nashua, New Hampshire, on June 26th. James P. Economos, Chicago, secretary of the committee, attended and assisted in the formulation of a state-wide program. Charles A. Tobey, Jr., Concord, state chairman for New Hampshire, and Burt R. Cooper, Rochester, president of the New Hampshire Bar Association, jointly presided. Harvey D. Booth, secretary of the Committee on Traffic Courts of the National Safety Council, and Mr. Economos spoke on improving the administration of Traffic Courts at the annual meeting of the Illinois State Bar Association at Peoria on June 10th.

The Traffic Court Committee also reports that reviews on George Warren's book, *Traffic Courts,* are steadily increasing as is evidenced by those appearing in the following journals: by Eldon R. Sloan in the April *Kansas Judicial Council Bulletin;* by Helen E. Yount and Hazel E. Anderson in the May *Journal of the Bar Association of the State of Kansas;* by N. W. Dougherty, Dean of College of Engineering, University of Tennessee, in the June *Tennessee Law Review;* by the Hon. J. J. Quillin, Judge of Municipal Court, Portland, in the April *Oregon Law Review;* and by the Hon. Lee E. Skeel, President of the Greater Cleveland Safety Council in the June *Cleveland Bar Association Journal.*

The Virginia annotations to the first and second volumes of the Restatement of Torts have just been completed by William T. Muse, who is entering foreign service with the American Red Cross. R. David Kreitler, Philadelphia, chairman of the Restatement Committee of the Junior Bar Conference, is happy to report completion of this work during this turbulent period.

The Black Hawk County (Iowa) Junior Bar Association has a novel way of corresponding with the members in service. Each member writes a few lines on a letter which is left with the clerk of the district court. When the letter is completed, mimeographed copies are sent to all members in service.

New officers of the Junior Barristers of the Los Angeles Bar Association are: chairman—Homer Howard Bell; first vice chairman—Wixon Stevens; second vice chairman—Austin H. Peck, Jr.; and secretary-treasurer—A. James Ayers. Stanley Gleis, retiring chairman, is in military service.

# BAR ASSOCIATION NEWS

## State Bar of Arizona

THE tenth annual meeting of the State Bar of Arizona was held at Phoenix on April 30. All of the business of the State Bar is transacted by the Board of Governors who met on

MATT S. WALTON
President, State Bar of Arizona

April 29. The meeting was called to order by Matt S. Walton of Phoenix in the absence of the president, Alfred Carr, who is engaged in war activities.

The only matter of any importance in the way of business coming before the convention was the report of the committee on probate procedure, which committee submitted a draft of the complete new probate code to replace the largely obsolete code adopted by the territorial legislature nearly fifty years ago. This drafted code is being printed and will be mailed out to all the lawyers of the state for criticism and suggestions. It is to be introduced in the next legislature.

The convention was addressed by Cleon T. Knapp of Tuscon, his subject being: "The Aftermath of the War—The Law." The speech made such an impression on the gathering that it was ordered printed and mailed out to the Bar.

Matt S. Walton of Phoenix was elected president; T. J. Byrne of Prescott, and Cullen A. Little of Globe were elected vice presidents; James E. Nelson of Phoenix was re-elected secretary and Stanley A. Jerman of Phoenix was elected treasurer.

At the banquet, J. H. Morgan of Prescott was the principal speaker, his subject being, "A Challenge to Leadership."

## Georgia Bar Association

MARVIN A. ALLISON
President, Georgia Bar Association

THE annual meeting of the Georgia Bar Association was held in Atlanta on June 2 and 3.

The principal speaker was Senator Elbert B. Thomas of Utah.

At the annual banquet Hon. Ellis Arnall, Governor of Georgia, acted as toastmaster, and addresses were delivered by Hon. Henry M. Steagall, chairman of the Banking and Currency Committee of the House of Representatives, and Hon. M. H. Henderson, British Consul in Atlanta.

The newly elected officers are: Marvin A. Allison, Lawrenceville, president; George W. Williams, Cordele, vice president, and Charles J. Bloch, Macon, secretary and treasurer.

John B. Harris, retiring president, who has also served the association as secretary from 1932 to 1942, was elected editor of the Georgia Bar Journal.

## Illinois State Bar Association

THE sixty-seventh annual meeting of the Illinois State Bar Association was held at Peoria on June 9, 10 and 11. The interest of Illinois lawyers in war problems of the organized bar was reflected in the fact that attendance at the convention, and the meeting of the Association of Wives of Illinois Lawyers held at the same time and place, was only slightly under the normal of previous years.

WARREN B. BUCKLEY
President, Illinois State Bar Association

R. V. Fletcher, Washington, D. C., vice president of the Association of American Railroads and a former vice president of the Illinois State Bar Association, delivered the principal address of the convention, an able and provocative analysis of the development of the United States Supreme Court as a legislative body. Challenging addresses were made by Carl B. Rix, Milwaukee, and George E. Brand, Detroit.

Benjamin Wham, Chicago, presented an interesting paper on the post-war problems of the bar at the annual legal history breakfast.

Officers of the Illinois State Bar Association elected at this meeting include the following: Warren B. Buckley, Chicago, president; Henry C. Warner, Dixon, first vice president; Tappan Gregory, Chicago, second vice president; Kaywin Kennedy, Bloomington, third vice president; B. F. Langworthy, Chicago, secretary; and A. C. Margrave, Springfield, treasurer.

B. F. LANGWORTHY, *Secretary*

## Iowa State Bar Association

THE forty-ninth annual meeting of the Iowa State Bar Association, held June 3, 4 and 5 in Des Moines, featured a forum on the New Rules of Civil Procedure which will become effective July 4. The newly-adopted Rules were promulgated by the Supreme Court of Iowa in accordance with the legislative directive of the 1941 legislature. The actual work of drafting was accomplished through an advisory committee appointed by the supreme court much in the same manner that the Federal Rules of Procedure were drafted.

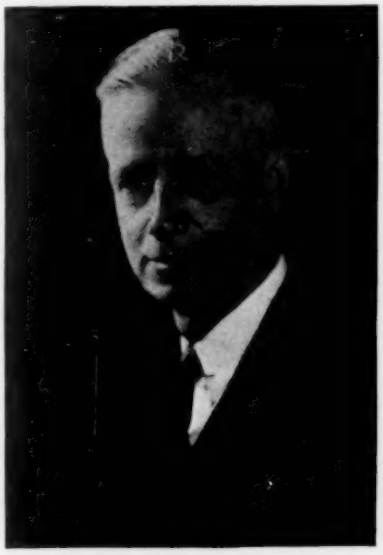
Forrest Seymour, of the *Des Moines Register and Tribune*, a recent Pulitzer prize winner, addressed the annual banquet on June 4.

Chief Justice Robert G. Simmons, Supreme Court of Nebraska, spoke at the annual luncheon in honor of the Supreme Court of Iowa on June 5.

The officers elected for the ensuing year were: Denis M. Kelleher, Fort Dodge, president; Wayne G. Cook, Davenport, vice president; Boni B. Druker, Des Moines, librarian; Paul B. DeWitt, Des Moines, secretary, (granted leave of absence while serving as a lieutenant in the Navy), and John S. Howland, Des Moines, acting secretary. Both President Kelleher and Vice President Cook served on the advisory committee heretofore mentioned, Mr. Cook as chairman.

## The Bar Association of the State of Kansas

THE sixty-first annual meeting of the Bar Association of the State of Kansas was held at Topeka on May 28 and 29.



E. C. FLOOD
President, The Bar Association of the State of Kansas

On Friday afternoon, May 28, President Charles D. Welch of Coffeyville gave his address. Lt. Arthur J. Stern, Courts and Boards Officer of the Topeka Air Base, discussed the work of the Office of Courts and Boards. A tribute was paid to the 445 Kansas lawyers in the armed services by Hon. Hugo T. Wedell of the Kansas Supreme Court.

The entire morning of Saturday, May 29 was devoted to a symposium on the new Kansas Labor Law which was arranged by the Association's committee on sections.

On Saturday evening the sixty-first annual banquet of the association was held. President Charles D. Welch acted as toastmaster and a short address was given by Governor Andrew F. Schoeppel. Hon. Jeff O. Williams of Chickasha, Oklahoma, was the main speaker of the evening.

The meeting adjourned with the introduction of the new president and president-elect. New officers of the association are: E. C. Flood, Hays, president; Everett E. Steerman, Emporia, president-elect; J. G. Somers, Newton, vice president, and Robert M. Clark, Topeka, was re-elected secretary-treasurer.

## Kentucky State Bar Association

IN compliance with the suggestion of the Office of Defense Transportation, the Kentucky State Bar Association cancelled its 1943 annual meeting and held instead fourteen district meetings at key points in the state. This revised plan enabled lawyers to come together without extensive or excessive travel.

The Board of Bar Commissioners met in Louisville on April 1 and 2 and selected the following officers: Charles S. Adams, Covington, president; William B. Gess, Lexington, president-elect; Edward A. Dodd, Louisville, vice president; Samuel M. Rosenstein, Frankfort, secretary, and C. Hill Cheshire, Frankfort, registrar-treasurer.

## Louisiana State Bar Association

THE Louisiana State Bar Association held its third annual meeting in Baton Rouge on Friday and Saturday, April 30 and May 1.

The invited speakers for the meeting were: George Maurice Morris,

SUMTER D. MARKS, JR.
President, Louisiana State Bar Association

Washington, D. C., President of the American Bar Association, who spoke on "The War Effort of the Organized Bar"; and John Galway Foster, Washington, D. C., First Secretary and Legal Adviser to the British Embassy.

LeDoux R. Provosty, Alexandria, president, delivered the president's annual address.

George Maurice Morris, whose address was instructive and of great benefit to the association's activities in the war effort, also met with the Committee on War Work and with Colonel Julian Hyer of the Judge Advocate General's office of the Eighth Service Command, and the various Legal Assistance Officers of the several camps in Louisiana. A rather comprehensive program was formulated in the direction of servicing in a legal way the members of the armed forces in Louisiana.

The Special Committee on Judicial Administration, Charles F. Fletchinger, of New Orleans, chairman, submitted its report which recommended the adoption of a system for securing judicial statistics and the holding of judicial conferences in Louisiana. The association approved the recommendations of the special committee and resolved to memorialize the Supreme Court to earnestly consider the report, suggesting ways and means for improving the administration of the law in this state, by inaugurating a system of securing reports and statistical data from the inferior courts for use by the Supreme Court and also by adopting a method for holding judicial conferences.

The following officers were inducted into office, having been previously nominated and elected: Sumter D. Marks, Jr., New Orleans, president; H. Payne Breazeale, Baton Rouge, vice president, and St. Clair Adams, Jr., New Orleans, secretary-treasurer.

## New Jersey State Bar Association

THE forty-fifth annual meeting of the New Jersey State Bar Association was held on June 4 and 5 in New York City. All committees reported great activity.

Judge Richard Hartshorne of Newark, chairman of the Committee on War Work, gave a report of activities which indicated that the committee and association have pioneered in several fields pertaining to the work of lawyers during the war period. Preparations are now being made to cooperate in the Legal Assistance Program of the American Bar Association in centers of military activity.

The Fire Insurance Committee of the Insurance Section had been requested by the Commissioner of Banking and Insurance in New Jersey to examine and suggest a revision of the standard fire insurance policy used in this state. A detailed report of this study was presented to the Association.

AUGUSTUS C. STUDER, JR.
President, New Jersey State Bar Association

A legal institute, at which Samuel J. Foosaner, of Newark, presided, was held during the meeting. An interesting question and answer period followed a discussion on "Practical Approach to Solving Wage and Hour and Wage Stabilization Problems" by Thomas F. Mulhern, Supervising Inspector of the Wage and Hour Division, Newark, and on "Practice under OPA Rent Regulations," by Nathan J. Schildkraut, Chief Trenton District Rent Attorney.

The address of the retiring president, William J. Connor of Trenton, urged that lawyers take the lead in combating the evil of divorce. He advocated an integrated bar in New Jersey.

The annual banquet, over which the retiring president presided, was addressed by Hon. John C. Arnold, recent president of the Pennsylvania State Bar Association, and by Hon. Daniel J. Brennan, of Newark.

The officers for the ensuing year are: Augustus C. Studer, Jr., Newark, president; David M. Klausner, Jersey City, Albert A. F. McGee, Atlantic City, and Walter G. Winne,

Hackensack, vice presidents; Emma E. Dillon, Trenton, secretary, and Joseph J. Summerill, Jr., Camden, treasurer.

## Pennsylvania Bar Association

THE executive committee of the Pennsylvania Bar Association convened June 5 in Harrisburg, upon the call of the president, John C. Arnold, for the transaction of the business of the association.

WILLIAM CLARKE MASON
President, Pennsylvania Bar Association

The first item on the agenda was the question of whether the association should attempt to hold an annual meeting. After thorough debate and the consideration of all points of view, a roll-call vote of the members of the executive committee resulted in seventeen votes against holding a meeting and three in favor of the proposition.

Committee and section reports were received and acted upon by the executive committee. These reports will appear in the annual volume of the association to be published early this autumn.

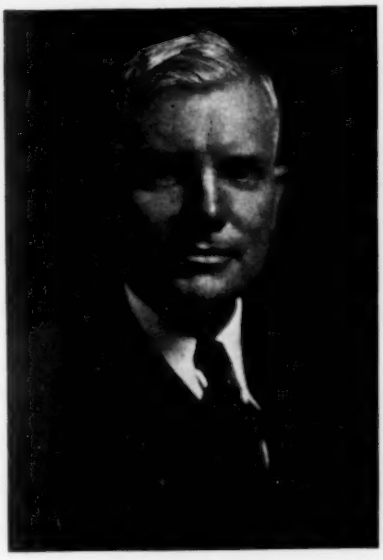
Past president Gernerd presented the report of the nominating committee wherein J. Paul MacElree of West Chester was nominated for vice president, John McI. Smith of Harrisburg for secretary, Fidelity-Philadelphia Trust Company for treasurer, and Mrs. Barbara Lutz for executive secretary. The nominees were elected for the ensuing year.

President Arnold called for nominees for the presidency of the association. William Clarke Mason, of the Philadelphia Bar, was nominated for president, the nomination was seconded, Mr. Mason was elected by acclamation and took office immediately.

The new president and the new vice president were chosen as delegates to the American Bar Association.

## Bar Association of Tennessee

THE sixty-second annual meeting of the Bar Association of Tennessee was held at Memphis, June 4 and 5. President Sam Costen presided.



ALBERT W. STOCKELL
President, Bar Association of Tennessee

Major General Myron C. Cramer, The Judge Advocate General, delivered the principal address at the banquet, his subject being, "The Lawyer in This War."

Officers elected for the year 1943-44 were president, Albert W. Stockell of Nashville; vice presidents, John Vorder Bruegge of Memphis, Hugh T. Shelton of Columbia, J. Malcolm Shull of Elizabethton; secretary-treasurer, Thos. O. H. Smith of Nashville.

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